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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 154 1547.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

TINE COHEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1899.
CERTIORARI AND RETURN FILED MAR 10 1900

(17,568.)

(17,568.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 454.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

TINE COHEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1900.

1 In the Circuit Court of the United States for the District of Washington, Western Division, July Term, 1898.

Be it remembered that on the ninth day of November, 1898, there was duly filed in said circuit court of the United States for the district of Washington, western division, a complaint in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Complaint.

Comes now the above-named plaintiff, Tine Cohen, and complains of the above-named defendant, The Mutual Life Insurance Company of New York, and for her cause of action against said defendant alleges:

I.

That said defendant is a corporation duly organized, acting
2 and existing under and by virtue of the laws of the State of New York for the purpose of carrying on a life-insurance business, having its principal place of business in the city of New York, State of New York.

II.

That during all the times herein mentioned the plaintiff was and now is a resident, citizen and inhabitant of the State of Washington.

III.

That on or about the tenth day of June, 1885, said defendant in consideration of the sum of eighty-nine and sixty-one one-hundredths dollars ($89.61), to it in hand paid by one Alexander Cohen, made, executed, and delivered in said city and State of New York a certain contract of life insurance hereinafter set forth whereby it insured the life of said Alexander Cohen in the sum of three thousand dollars. That defendant in said contract agreed to pay to the wife of said Alexander Cohen, Tine Cohen, if living, and, if not living, then to their children, their executors, administrators, or assigns, within sixty days after satisfactory proof at its said office of the death of said Alexander Cohen during the continuance of said policy, the sum of three thousand dollars. Said contract is in words and figures as follows, to wit:

No. 264,857.

Semi-endowment.

The Mutual Life Insurance Company of New York.

Age, 37 years. Amount, $1,500 end.

½ annual premium, $45.57. 3,000 life.

In consideration of the application for this policy, and of
3 the truth of the several statements made therein, and of the premiums hereinafter specified, promises to pay, at its home office in the city of New York, unto Alexander Cohen of Butte City, in the county of Silver Bow, State of Montana, fifteen hundred dollars, on the tenth day of June, in the year 1905, if then living, at its said office of the company in the city of New York, or, if he should die before that time, then in like manner to pay the sum of three thousand dollars to his wife, Tine Cohen, if living, and, if not living, then to their children, their executors, administrators, or assigns (any indebtedness to the company on account of this contract to be first deducted therefrom), within sixty days after satisfactory proof at its said office of the death of said Alexander Cohen during the continuance of this policy, upon the following conditions:

First. The — annual premium of eighty-nine dollars and sixty-one cents shall be paid in advance to the company, at its home office in the city of New York, on the delivery of this policy, and thereafter on the tenth day of June in every year during the continuance of this contract.

Second. The insured shall not transgress the limits of residence and travel prescribed on the back of this policy, which are hereby referred to and made part hereof, or engage in any occupation there forbidden, without the consent of the company in writing.

Third. The company does not insure against self-destruction in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured.

Fourth. If this policy shall become void, all payments
4 previously made upon it shall be forfeited to the company; but, if such forfeiture shall occur by non-payment of premium, after three full annual premiums have been paid, the company will, upon surrender of this policy, within six months after such forfeiture, issue a paid-up policy for a fixed sum computed according to the legal standard of the State of New York.

Fifth. Proofs shall be furnished to the company as soon as possible after the death of the insured in such form and containing such statements as the company shall require under its general rules.

Sixth. Any claim under this policy shall be presented in writing to the company, at its home office, in the city of New York, accompanied by a statement of the court in which the same is to be prosecuted if not settled, at least sixty days before any action shall be commenced thereon, to the end that the same may be settled

amicable; and, in case such claim should arise after the death of the insured, any action thereon shall be commenced in one year thereafter.

In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the tenth day of June, A. D. one thousand eight hundred and eighty-five.

ROB'T A. GRANNISS,
Vice-President.

ISAAC S. LLOYD, *Secretary.*

Provisions and Requirements Referred to in This Policy.

This company allows the insured under this policy to
5 reside, travel and visit within the following geographical limits, and to make voyages in first-class vessels to and from places within said limits during the periods hereinafter respectively provided:

First. Within the Dominion of Canada and the peninsula of Alaska, south of the sixtieth parallel of north latitude. In Europe north of the forty-second parallel of north latitude. In the United States of America between the parallels sixty degrees and thirty-six degrees thirty minutes north latitude, in North Carolina, South Carolina and Georgia except within sixty miles of the Atlantic ocean. In Tennessee east of the Tennessee river. In Alabama north of the thirty-second degree north latitude. In that part of Florida within sixty miles of the Atlantic ocean, north of the parallel twenty-eight degrees north latitude. And in all parts of the United States west of the meridian ninety-two degrees west longitude, north of thirty-three degrees north latitude, and west of the meridian ninety-five degrees west longitude, north of the thirty-three degrees north latitude, and west of the meridian ninety-five degrees west longitude, except within sixty miles of the gulf of Mexico. In the cities of Wilmington, N. C., Charleston, S. C., Savannah, Ga., and Tallahassee, Fla. ——. During the entire year.

Second. In all parts of the United States, south of the sixtieth parallel of north latitude. —— between November 1 and July 1.

Also:

Third. On the continent of Europe, south of the forty-second parallel of north latitude, in Egypt, Palestine, and Syria.
6 ——. During the months of November, December, January, February, March, April and May.

Fourth. Any place not above specified on or near the Mississippi river or within sixty miles of the Atlantic ocean or gulf of Mexico, south of the parallel of thirty-six degrees thirty minutes north latitude within the United States. ——. Not exceeding three days at any one time, between July 1 and November 1.

Fifth. At any place in Tennessee west of the Tennessee river; in Alabama south of the thirty-second parallel of north latitude; in Arkansas east of the meridian ninety-two minutes west longi-

tude; in Mississippi, in Louisiana, and in Texas within one hundred miles of the westerly line of Louisiana, for business purposes. ——. Not exceeding three days at any one time, between July 1 and November 1.

Subject to the following conditions:

First. That neither a state of war, nor cholera, yellow fever or plague shall exist at any such place in foreign countries during the period when so resided in or visited.

Second. That in case of visit between July 1 and November 1, to any of the points specified in paragraphs four and five, or while residing in Savannah, Georgia, Wilmington, North Carolina, or Charleston, South Carolina, the company shall not be liable in case of the death of the insured resulting from yellow fever contracted during such visit or residence, unless it shall appear that he has been previously acclimated to such regions by continuous residence or by having had the yellow fever.

7 To visit, travel, or reside beyond the limits and boundaries above given permission must be obtained from the company in writing.

Occupation and employments.—The insured shall not engage in blasting, mining, submarine labor, aeronautic travel or excursions, the manufacture, handling, or transportation of inflammable explosive substances, service upon any railroad or any steamboat or other vessel, or in military or naval service of any kind in time of war, without the consent of the company in writing.

Notice.

Payment of premiums.—All premiums are due and payable at the home office of the company in the city of New York; but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived, and that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company on account of this contract, and shall be deducted from the amount of the claim.

Power of agents.—No agent has power, on behalf of the company, to make or modify this or any contract of insurance, to extend the time for paying a premium, to issue a permit for residence, travel, or occupation, or to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

8 Assignments.—The company declines to notice any assignment of this policy until the original or a duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

IV.

That on the twenty-first day of September, 1897, said Alexander Cohen died in the city of Rossland, British Columbia, Dominion of Canada.

V.

That during the lifetime of said Alexander Cohen he duly performed all the conditions of said contract by him to be performed.

VI.

That on or about the twenty-seventh day of December, 1897, the plaintiff caused said defendant to be notified of the death of said Alexander Cohen, stating that he had died on or about the twenty-first day of September, 1897. That on said date the plaintiff furnished the defendant with good and sufficient proofs of the death of said Alexander Cohen.

VII.

That on or about the third day of January, 1898, said defendant acknowledged the receipt of said notice and proofs of death and made no objection to the kind, form, or sufficiency of said proofs of death. That on or about the tenth day of February, 1898, said defendant requested the plaintiff to procure further proofs of death on what it pretended and alleged to be its usual form of proof of death. That with much trouble, labor and expense, to wit,
9 $25.00, plaintiff undertook to comply with said demand, but was unable to secure the certificate of the physician who attended said Alexander Cohen at his death.

VIII.

That on or about the first day of May, 1898, defendant denied to the plaintiff any and all liability on said policy of insurance.

IX.

That said plaintiff has duly complied with all the conditions of said contract by her necessary to be complied with.

X.

That the plaintiff Tine Cohen is the Tine Cohen in said policy mentioned, and during all the times herein mentioned and up to the time of the death of said Alexander Cohen was his lawfully wedded wife.

XI.

That plaintiff is now the owner and holder of said policy, and there is now due her from said defendant the full sum of three thousand dollars, with interest thereon from the fifth day of March, 1898.

XII.

That said defendant has wholly neglected to pay said policy or any part thereof.

Wherefore, plaintiff prays judgment against said defendant
10 in the full sum of three thousand dollars, with interest thereon from the fifth day of March, 1898, together with her costs and disbursements in this action.

S. WARBURTON,
Attorney for Plaintiff,
310 *Fidelity Building, Tacoma, Washington.*

STATE OF WASHINGTON, }
County of King, } *ss:*

Tine Cohen, being first duly sworn, on her oath deposes and says that she is the plaintiff in the above-entitled action; that she has read the within and foregoing complaint, knows the contents thereof, and believes the same to be true.

MRS. TINE COHEN.

Subscribed and sworn to before me this nineteenth day of October, 1898.

G. W. UPPER,
Notary Public in and for Washington, Residing at Seattle.

Endorsed and filed in the United States circuit court, Nov. 9, 1898.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-ninth day of November, 1898, there was duly filed in said court in said cause a motion to make more definite and certain in the words and figures following, to wit:

11 In the Circuit Court of the United States for the Ninth Circuit, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 613.

Motion to Make More Definite and Certain.

Comes now the above-named defendant, and moves the court to require the plaintiff to make her complaint, and particularly paragraph V thereof, more definite and certain in this:

I.

That the said plaintiff be required to state whether the said Alexander Cohen in his lifetime made or caused to be made payment of the annual premium of eighty-nine and sixty-one one-hundredths dollars, becoming due on the policy referred to in said complaint,

each year, subsequent to the delivery of said policy at the time in said policy provided, and, if payment was not so made, to require said plaintiff to state what, if any, payments of premium were made upon said policy subsequent to the delivery thereof.

II.

And in case the said Alexander Cohen in his lifetime failed to pay all or any of the premiums falling due upon said policy subsequent to the delivery thereof, whether the said plaintiff has ever
12 tendered or offered to make payment of any premium upon said policy unpaid at the time of the death of said Alexander Cohen.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Filed in the United States circuit court Nov. 29, 1898.
A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

And afterward, to wit, on the nineteenth day of January, 1899, there was duly filed in said court in said cause an order overruling motion to make more definite and certain, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 613.

Order Denying Motion to Make More Definite and Certain.

This cause coming on to be heard on the motion of the defendant to require the plaintiff to make her complaint more definite and certain, and the court being fully advised—

It is ordered that said motion be, and the same is hereby, overruled and denied.

13 To this ruling of the court the defendant excepts, and its exception is allowed.

C. H. HANFORD, *Judge*.

Filed in the United States circuit court Jan. 19, 1899.
A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

And afterward, to wit, on the twenty-third day of March, 1899, there was duly filed in said court in said cause an answer, in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 613.

Answer.

Comes now the above-named defendant, and makes answer to the complaint herein as follows:

I.

For answer to paragraph three of said complaint, defendant admits that the contract or policy of insurance therein set forth, No. 264,857, was made, executed, and delivered between the said Alexander Cohen and defendant, at the time and for the consideration in said paragraph stated, but denies that the said contract was made or delivered for the said sum of $89.61, or any part of it, was paid by the said Alexander Cohen, or caused to be paid by him in
14 said city or State of New York, or any other place than at Butte City, in the Territory, now State, of Montana.

II.

For answer to paragraph five of said complaint, defendant denies the same, and each and every allegation therein contained.

III.

For answer to paragraph seven, defendant admits that on or about January 3, 189–, defendant acknowledged receipt of said notice and proofs of death, and made no objection to the sufficiency thereof, but denies each and every other allegation in said paragraph contained.

IV.

In answer to paragraph nine defendant denies the same and each and every allegation therein contained.

V.

For answer to paragraph eleven of said complaint, defendant denies the same; and each and every allegation in said paragraph contained.

And by way of a further and affirmative answer and defense to the said complaint, defendant alleges the following:

I.

That defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life-insurance business, having its principal place of business in the city of New York, State of New York, and was such corporation during all the times hereinafter named.

15 II.

That on or about the tenth day of June, 1885, in consideration of the application in writing to this defendant for a policy of insurance and of the truth of the several statements therein made, and the premiums in such policy specified, to wit, the premium of $89.61 to be paid at the place of delivery of said policy, and the further annual premium of $89.61 payable in advance to defendant at its home office in the city of New York, on the tenth day of June in every year, during the continuance of said policy, the said defendant at said Butte City, Montana, executed and delivered to said Alexander Cohen, its policy of insurance upon its life, wherein and whereby it insured the life of the said Alexander Cohen in the sum of three thousand dollars—fifteen hundred dollars of said amount to be paid to the said Alexander Cohen on the tenth day of June, in the year 1905, if he should then be living, or, if he should die before that time, then the said entire sum of three thousand dollars to be paid to his wife, Tine Cohen, if living, and if not living, then to their children, executors, administrators, and assigns, provided the said contract of insurance should continue in existence upon the happening of said event, which said contract or policy of insurance is the said policy No. 264,857 set forth in plaintiff's complaint. That the application mentioned in and as constituting a part of said policy, and which does constitute a part of the said policy and contract of insurance, contains, among others, the following provision:

"It is hereby declared and agreed that all the statements and answers to the printed questions written upon the forms A

16 and B, which, together with this declaration and agreement, constitute an application to the Mutual Life Insurance Company of New York, for an insurance of —— dollars upon the life of —— ——, are offered to the said company as a consideration of the contract applied for; each of which every person whose name is hereto subscribed warrants to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries. And this application is submitted to the said company with the following express covenants and agreements: 1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company, and the first premium thereon actually paid, during the continuance of the life proposed for insurance, in the same condition of health as described in the application. 2. That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy. 3. That in any distribution of surplus, the principles and methods which may be adopted by the company for such distributions, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed. 4. That in consideration of the surrender value promised in the policy, and in this application, viz: If this policy shall become forfeited by

non-payment of any premium at any time after three full annual premiums have been paid, the company will, upon the surrender of the policy issued on this application, within six months after such forfeiture, issue a non-participating paid-up policy for such
17 sum as the reserve upon this policy at the time of such forfeiture, according to the legal standard of the State of New York, will purchase as a single premium at the company's published rates, and in further consideration of the participation of the policy in any surplus of the company which may be distributed while it is in force, all right or claim to any other surrender value than that so promised, whether required by statute of any State or not, is hereby relinquished.

And there is printed upon and is constituting a part of the same, the following:

Special Notice to Applicants and Policy-holders.

The following facts relating to contracts between this company and its policy-holders are of special importance to all concerned, namely:

First. This company cannot entertain any proposition on the part of the husband to change the interest in a wife's policy, while said policy is in force in her favor.

Second. The company does not agree to restore a policy after lapse for non-payment of premium; and when, in special cases, policies are restored, satisfactory evidence of the insurable condition of the party must be given.

Third. No policy-holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company, in consequence of their non-reception.

Fourth. In making inquiries, state the number of the policy as well as the name of the assured.

18 Fifth. The fact that a policy has additions to its credit gives no authority to the company to apply them to the payment of premiums, without the written directions from the party interested.

III.

That said Alexander Cohen, on the eleventh day of June, 1892, paid one-half of the annual premium due on said policy for the year beginning on the eleventh day of June, all premiums due before that time having been paid, and thereafter wholly neglected, failed, and refused to pay any other or further annual premium, or part thereof, upon said policy, and that no payment whatever was made by or on behalf of said Alexander Cohen of any annual or semi-annual premium due upon the said policy, but the same was by him suffered to lapse and become forfeited. That the said policy of insurance contains a provision as follows:

"All premiums are due and payable at the home office of the

company in the city of New York, but will be accepted elsewhere whenever duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived."

That notwithstanding the last-named provision and other similar provisions in the said policy and application, the said Alexander Cohen wholly failed and neglected to pay or caused to be paid any premium or part of premium, due and payable upon said
19 policy subsequent to the payment of the half-annual payment thereon for the year beginning June 11, 1892, but suffered the said policy to become lapsed and forfeited for failure to make payment of premium, and that by reason of the said failure and neglect on the part of said Alexander Cohen to pay or cause to be paid the premiums due upon said policy, the same became forfeited and lapsed and void, so declared by defendant.

Wherefore defendant prays that plaintiff take nothing by her said action and the defendant recover its costs herein.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

STATE OF WASHINGTON, } ss:
County of King, }

Sherwood Gillespy, being first duly sworn, on oath deposes and says: That he is the general agent for the State of Washington of the defendant in the above-entitled action, authorized by it to solicit insurance in said State, and that he makes this affidavit in verification of the foregoing answer on behalf of said defendant. That he has read said answer, knows the contents thereof and believes the same to be true.

SHERWOOD GILLESPY.

Subscribed and sworn to before me this twenty-first day of March, 1899.

H. J. RAMSEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

20 Filed in the United States circuit court March 23, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterwards, to wit, on the thirtieth day of March, 1899, there was duly filed in said court in said cause a demurrer to answer and stipulation in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 613.

Demurrer to Answer.

Comes now the plaintiff, by her attorney, and demurs to the affirmative defense of the answer of the defendant herein on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. WARBURTON,
Attorney for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Pierce, }

S. Warburton, being the attorney for the plaintiff in the above cause, believes the foregoing demurrer is well founded in point of law.

S. WARBURTON.

21 Received copy this thirtieth day of March, 1899.
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Filed in the United States circuit court, district of Washington, March 30, 1899.

A. REEVES AYRES, *Clerk.*
R. M. HOPKINS, *Deputy.*

In the Circuit Court of the United States, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Stipulation as to the Application for Insurance.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel that the annexed paper is a true and correct copy of that certain application for insurance which is referred to in the complaint of the plaintiff in the above cause as well as in the answer of the defendant in the above cause. That the same shall be and is hereby agreed to be a part of plaintiff's complaint as much as if the same had been copied therein and set forth as a part of the complaint in said cause.

22 Dated the twenty-fourth day of March, 1899.
S. WARBURTON, *Attorney for Plaintiff.*
STRUVE, ALLEN, HUGHES & McMICKEN AND
STENDWICK & PETERS, *Attorneys for Defendant.*

Filed in the United States circuit court, district of Washington, March 30, 1899.

A. REEVES AYRES, *Clerk.*
R. M. HOPKINS, *Deputy.*

Form A.

Application for insurance in the Mutual Life Insurance Company of New York, 140 to 146 Broadway, corner of Liberty street, New York city, subject to the charter of such company and the laws of said State.

The following questions will be answered by the person whose life is proposed for insurance:

Give your full name—Alexander Cohen; residence, town—Butte City; county—Silver Bow; State—Montana.

Place of business, Butte City; county—Silver Bow; State—Montana.

What is your particular occupation or employment; if more than one, state all. Merchant—groceries and provisions, no bar.

Former residence, if recently changed? ——. Former occupation, if recently changed? ——.

In giving the occupation of the person, it is not sufficient
23 to state (for example) that he is a merchant or mechanic, but the particular branch of business, or the actual trade, must be specified.

What is the name of the person for whose benefit the insurance is proposed? Alexander Cohen.

Residence and post-office address. Butte City, Montana.

A. Do you wish the policy made payable in one sum or in installments? One sum.

Relationship to the person proposed for insurance? Self.

State the amount of insurance applied for. $3,000.00 (three thousand dollars).

B. If in installments, how many? ——.

State the kind of policy desired—if a semi-endowment, write the amount of insurance and amount of endowment separately. $3,000.00 insurance; $1,500.00 endowment.

C. Do you wish such installments to be annual, semi-annual or quarterly? ——.

How is the premium to be paid—annually, semi-annually, or quarterly? Annually.

If a life policy is applied for, state precisely whether it shall be paid (if for the benefit of the wife) to her children, or to the children of the two, if she shall be not living at its maturity. Children of the two.

(To be answered only in case an endowment is applied for.)

State to whom it shall be paid in case of the death of the beneficiary before the maturity of the contract. Tine Cohen, wife.

A. State your place of birth. A. Prussia, Germany.

24 B. The date of birth. B. July 4, 1848.

A. What is your age at the nearest birthday? B. Are you married? A. 37 years. B. Yes.

—. Are you now insured in this company? B. Give total amount. C. Give number of each policy. A. No. B. $——. C. ——.

Are you aware that the company will not be liable for insurance procured on any single life for over $30,000 (the prescribed limit) except on the semi-endowment plan? Yes.

A. Are you now insured in any other company? B. Give the name of each company, and the amount in each. A. No. B. ——.

Have you made any proposal or opened a negotiation for insurance upon your life, in any company or association? B. Has any application for such insurance ever been made upon which a policy has not been issued? State full particulars in either case, including the name of each company. A. No. B. ——.

A. Are you engaged in the manufacture or sale of intoxicating drinks? B. Have you ever been so engaged? State full particulars. A. No. B. No.

Dated at Butte City, Montana, the ninth day of June, 1885.

Signature of the person proposed for insurance:

ALEXANDER COHEN.

In the presence of—

T. F. McAVOY.

25 *Form B.*

Questions to the person proposed for insurance, the answers to which are to be submitted to the medical examiner, who will witness the signatures thereto.

1. A. Are you now in good health? B. Have you always had good health? A. Yes. B. Yes.

2. Have you been subject to or had any of the following disorders or diseases:

Asthma, apoplexy, bronchitis, cancer, colic (bilious, renal, or hepatic), consumption, or any form of trouble referable to the lungs, cough (habitual), chronic diarrhœa, delirium tremens, dizziness, difficulty in swallowing, or any other symptom indicating disease of the heart or neighboring vessels, difficulty in urinating (excessive or scanty), secretion of the urine, or any disease of the genital or urinary organs, dropsy? No.

Dyspepsia, dysentery, eruptions or disease of the skin, erysipelas, fistula, fits or convulsions, general debility, gout, gravel, or any symptom pointing to bladder or kidney trouble, habitual consumption, hemorrhoids, any other disease of the stomach or bowels, headaches (severe, frequent, or protracted), inflammation of the lungs, insanity, jaundice? No.

Liver complaint of any form, loss of consciousness, lumps or swellings of any kind, neuralgia, open sores, paralysis, palsy, palpitation of the heart, pleurisy, rheumatism, swelling of the feet, hands, or eyelids, spitting or coughing of blood, shortness of breath,

sunstroke, suppurating glands, syphilis, varicose veins, yellow fever? No.

26 3. A. Have you ever had any serious illness or disease other than those above mentioned? B. If so, state how long since. C. Its nature and duration. D. Is any effect now perceptible? A. No. B. ——. C. ——. D. ——.

4. Have you been subject to or had any difficulty with your eyesight or sense of hearing? No.

5. A. Have you ever had inflammatory rheumatism? B. If so how many attacks, and in what years? C. Duration and severity? D. Were they accompanied by cough, shortness of breath, pain in the chest, or palpitation of the heart? A. No. B. ——. C. ——. D. ——.

6. A. Are you ruptured? B. What form? Single or double? C. Is it reducible? D. Is a suitable truss worn? A. No. B. ——. C. ——. D. ——.

7. A. Have you ever had any malformation or injury, or undergone any surgical operation? If so, state fully its nature, duration, and results. A. No.

8. Have you any predisposition, either hereditary or acquired, to any constitutional disease (as consumption, rheumatism, syphilis, insanity)? No.

9. Has your weight recently increased or diminished? If so, to what extent and how rapidly, and to what cause do you attribute it? Average.

10. How long is it since you were successfully vaccinated? Had small-pox.

11. To what extent do you use alcoholic stimulants? Moderately.

27 12. To what extent have you been in the habit of using them during your past life? All the same.

13. What is your present habit with respect to the use of tobacco? Smoke moderately.

14. What has been your past habit with respect to the use of tobacco? The same.

15. A. Do you use opium or any other narcotic? B. Have you ever used them? A. No. B. No.

16. How long is it since you were attended by a physician or professionally consulted one? When about eleven years old.

17. For what disease or ailments? Small-pox.

18. Give the name and address of the physician that attended you. Can't remember.

19. What is the name and address of your usual medical adviser? None.

State, so far as you know, what was the age at death, cause of death, duration of final illness, and state of previous health of each of the following persons deceased. What is the age and present state of health of each of them if now living:

Age, if living, condition of health, age at death, cause of death, how long sick: Father: 90; age. Mother: 68; don't know; short time; previous condition good. Brothers: 1; 46; good. Sisters:

3; 50; good; 42; good; 39; good. Father's mother: 90; age. Father's father: 86; age. Mother's mother: 90; age. Mother's father: over 90; don't know.

In giving cause of death, avoid all indefinite terms, such as "general debility," "fever," "exposure," etc. If the word child-
28 birth be used, how long after delivery did death occur, and were there any symptoms of disease of the chest, such as cough, expectoration, etc.

20. Have your grandparents, or any of their descendants, died or suffered from consumption, scrofula, insanity, gout, rheumatism, or any pulmonary or hereditary disease? If so, what was the age of such person at death? His or her relationship to you? The cause of death? Answer in detail. No.

21. Is there anything, or has there ever been anything in your physical condition, family or personal history or habits, tending to shorten your life, which is not distinctly set forth above? No.

The following declaration and agreement must be signed by the person in whose favor a policy is applied for and by the person whose life is proposed for insurance:

It is hereby declared and agreed that all the statements and answers to the printed questions upon the forms A and B, which, together with this declaration and agreement, constitute an application to the Mutual Life Insurance Company of New York, for an insurance of —— dollars upon the life of —— ——, are offered to the said company as a consideration of the contract applied for; each of which, every person whose name is hereto subscribed warrants to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries. And this application is submitted to the said company with the following express covenants and agreements: 1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by
29 the said company, and the first premium thereon actually paid, during the continuance of the life proposed for insurance, in the same condition of health as described in the application; 2. That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy; 3. That in any distribution of surplus, the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed; 4. That in consideration of the surrender value promised in the policy, and in this application, viz: If this policy shall become forfeited by non-payment of any premium, at any time after three full annual premiums have been paid, the company will, upon surrender of the policy issued on this application, within six months after such forfeiture, issue a non-participating paid-up policy for such sum as the reserve upon this policy at the time of such forfeiture, according to the legal standard of the State of New York, will purchase as a single pre-

mium at the company's published rates, and in further consideration of the participation of the policy in any surplus of the company which may be distributed while it is in force, all right or claim to any other surrender value than that so promised, whether required by statute of any State or not, is hereby relinquished.

Dated at Butte, State of Montana, this ninth day of June, 1885.

30 A wife may sign by her husband, and children by their father, thus:

Wife: MARY SMITH,
By JOHN SMITH.
Children: ELLEN BROWN,
THOMAS BROWN,
By WILLIAM BROWN.

In the presence of—
H. A. AMSDEM, M. D.,
Medical Examiner.

Signature of the applicant:
ALEXANDER COHEN.

Signature of the person proposed for insurance:
ALEXANDER COHEN.

And afterward, to wit, on the thirty-first day of March, 1899, there was duly filed in said court in said cause a judgment in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 613.

Order Sustaining Demurrer and Judgment.

This cause coming on to be heard upon the plaintiff's demurrer to the defendant's answer herein, and the court having heard
31 the arguments of counsel thereon, and having considered the same, and being now fully advised in the premises:

It is ordered that said demurrer be, and the same is, hereby sustained; to which ruling of the court sustaining said demurrer the defendant by its counsel in open court at the time duly excepts, and its exception is allowed by the court.

Thereupon the defendant, by its counsel, in open court, announces that it does not desire to amend its said answer, but elects to stand thereon, and refuses to plead further; whereupon the plaintiff, by her counsel, moves the court for judgment in favor of the plaintiff and against the defendant upon said demurrer; and the court, being now fully advised in the premises, grants said motion and

orders judgment accordingly, to which action of the court in granting said motion for judgment and ordering judgment defendant at the time excepts, and its exception is allowed.

It is now therefore considered, adjudged, and decreed that the plaintiff, Tine Cohen, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of two thousand six hundred and seventy-one and forty-one one-hundredths (2,671.41) dollars, with interest thereon from the date hereof, together with the costs of this action, taxed at twenty-two and seven one-hundredths dollars, and that execution issue therefor; to which judgment and every part thereof defendant at the time excepts, and its exception is allowed.

Done in open court this thirtieth day of March, 1899.

C. H. HANFORD, *Judge.*

32 Filed in the United States circuit court March 31, 1899.
A. REEVES AYRES, *Clerk,*
By SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-fifth day of April, 1899, there was duly filed in said court in said cause an assignment of errors in the words and figures following, to wit:

In the United States Court of Appeals for the Ninth Circuit.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error, *vs.* TINE COHEN, Defendant in Error. } No. 613.

Assignment of Errors.

In the matter of the petition of The Mutual Life Insurance Company of New York, plaintiff in error.

Comes now the above-named plaintiff in error, Mutual Life Insurance Company of New York, on this twenty-fifth day of April, 1899, by its attorneys, Edward Lyman Short, Struve, Allen, Hughes & McMicken, and Strudwick & Peters, and say that in the record and proceedings in the above-entitled matter there is manifest error, of which it makes the following assignment of error in the above-entitled cause, to wit:

I.

The circuit court of the United States for the district of Washington, western division, erred in sustaining the demurrer
33 of the plaintiff and defendant in error, The Mutual Life Insurance Company of New York, a corporation.

II.

The said circuit court erred in sustaining the demurrer of said plaintiff and defendant in error to the answer of defendant and plaintiff in error.

III.

The said circuit court erred in granting judgment in favor of said plaintiff and defendant in error against said defendant and plaintiff in error for the amount of said judgment, or any sum, because it is manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment.

IV.

The said circuit court erred in not submitting said cause to trial upon the issues formed by the pleadings.

Wherefore, the said plaintiff in error prays that the judgment of the said circuit court of the United States for the district of Washington, western division, be reversed, and that the said circuit court of the United States be ordered to enter an order reversing and setting aside said judgment and granting a new trial in said cause.

EDWARD LYMAN SHORT AND
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Plaintiff in Error.

34 Copy of foregoing assignment of errors received and service of same acknowledged at Tacoma, Washington, this twenty-fifth day of April, 1899.

S. WARBURTON,
Attorney for Tine Cohen, Defendant in Error.

Filed in the United States circuit court, district of Washington, April 25, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHEW, *Deputy.*

And afterward, to wit, on the twenty-fifth day of April, 1899, there was duly filed in said court in said cause a petition for writ of error, bond, and order allowing writ of error, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant. } No. 613.

Petition for Order Allowing Writ of Error.

The said defendant, The Mutual Life Insurance Company of New York, a corporation, feeling itself aggrieved by the judgment entered in said cause on the thirty-first day of March, 1899, in favor of said plaintiff and against said defendant for the sum
35 of two thousand six hundred and seventy-one and forty-one one-hundredths dollars, and twenty-two and seven one-hun-

dredths dollars costs, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of the said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing said defendant to prosecute a writ of error to the honorable United States circuit court of appeals for the ninth circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause may be suspended and stayed until the determination of said writ of error by said circuit court of appeals for the ninth circuit. And further prays that a transcript of record, proceedings, and papers in this cause, duly authenticated, may be sent to the circuit court of appeals, and your petitioner will ever pray.

Dated this twenty-fifth day of April, 1899.

EDWARD LYMAN SHORT AND
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for the Defendant, The Mutual Life Insurance Company of New York (a Corporation).

Copy of foregoing petition for order allowing writ of error received, and service of same acknowledged at Tacoma, Washington, this twenty-fifth day of April, 1899.

S. WARBURTON,
Attorney for Tine Cohen, Plaintiff.

36 Filed in the United States circuit court, district of Washington, April 25, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHEW, *Deputy.*

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant. } No. 613.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the court-room of said court in the city of Tacoma, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, a corporation, herein filed, praying the allowance of a writ of error to the United States circuit court of appeals for the ninth circuit, together with the assignment of errors also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered,

duly authenticated, may be sent to the United States circuit court *court* of appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises.

37 The court having duly considered the same, does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant, The Mutual Life Insurance Company of New York, a corporation, of a bond according to law in the sum of four thousand dollars, the same shall operate as a supersedeas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this twenty-fifth day of April, 1899.

C. H. HANFORD, *Judge.*

Copy of the foregoing order received and service of the same acknowledged this twenty-fifth day of April, 1899.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court, district of Washington, April 25, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHEW, *Deputy.*

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant. } No. 613.

Supersedeas Bond.

Know all men by these presents, that we, The Mutual Life Insurance Company of New York, a corporation, the above-named

38 defendant, as principal, and E. C. Newfelder and R. V. Ankeny, of King county, Washington, as sureties, are held and firmly bound unto Tine Cohen, the above-named plaintiff, in the sum of four thousand dollars, to be paid to said plaintiff, her executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this twenty-fifth day of April, 1899.

The condition of the above obligation is such, that whereas, in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff, in the sum of two thousand six hundred and seventy-one and forty-one one-hundredths dollars, with interest and costs, and

Whereas, the said defendant has obtained from said court a writ

of error to reverse the judgment in said action, and a citation directed to the plaintiff is about to be issued citing and admonishing her to be and appear in the United States circuit court of appeals for the ninth circuit, to be held at San Francisco, in the State of California:

Now therefore, if the said defendant, The Mutual Life Insurance Company, a corporation, of New York, shall prosecute the said writ of error to effect, and shall answer all damages and costs that
39 may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, [SEAL.]
By N. W. ENGLE,
Its Agent for the State of Washington,
And by STRUVE, ALLEN, HUGHES & McMICKEN,
Its Attorneys.
E. C. NEUFELDER. [SEAL.]
R. V. ANKENY. [SEAL.]

UNITED STATES OF AMERICA, }
District of Washington, King County, } ss:

E. C. Neufelder and R. V. Ankeny, sureties on the foregoing bond, being each duly sworn, each for himself deposes and says: That he is a freeholder in said district, and that he, the said E. C. Neufelder, is worth the sum of four thousand dollars; and that he, the said R. V. Ankeny, is worth the sum of four thousand dollars, and in each case exclusive of property exempt from execution, and over and above all debts and liabilities.

E. C. NEUFELDER.
R. V. ANKENY.

Subscribed and sworn to before me this twenty-fifth day of April.

JAMES KEIFER,
United States Commissioner.

The sufficiency of the sureties of the foregoing bond approved by me this twenty-fifth day of April, 1899.

C. H. HANFORD,
Judge of said Court.

40 Copy of foregoing bond received and service of same acknowledged, at Tacoma, Washington, this twenty-fifth day of April, 1899.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court, district of Washington, April 25, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHEW, *Deputy.*

Deputy.

And afterward, to wit, on the twenty-fifth day of April, 1899, there was duly filed in said court in said cause an original writ of error, in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceeding-, and also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Tine Cohen, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal,
41 distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-fourth day of May, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of the said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

42 Received this twenty-fifth day of April, 1899, a true copy of the foregoing writ of error, for defendant in error, Tine Cohen.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

Filed in the United States circuit court, April 25, 1899.
A. REEVES AYRES, *Clerk,*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-fifth day of April, 1899, there was duly filed in said court in said cause, a copy of writ of error in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Tine Cohen, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said, The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings
43 aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-fourth day of May, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Filed in the United States circuit court April 25, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

44 And afterward, to wit, on the twenty-fifth day of April, 1899, there was duly issued out of and returned and filed in said court a citation in the words and figures as follows, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To Tine Cohen, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the twenty-fourth day of May, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of Washington, western division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the twenty-fifth day of April, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Attest: A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAMUEL D. BRIDGES, *Deputy.*

45 We hereby, this twenty-fifth day of April, 1899, acknowledge service of the foregoing citation at Tacoma, Washington.

S. WARBURTON,
Counsel for Tine Cohen.

Filed in the United States circuit court April 25, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

In the Circuit Court of the United States for the District of Washington, Western Division.

TINE COHEN, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 609.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Washington,* } ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the ninth circuit, district of Washington, western division, do hereby certify that the foregoing typewritten pages, numbered from one to thirty-eight, both inclusive, constitute and are a complete, true and correct copy of the record, papers, and all proceedings had in said action as the same remains on file and of record in the office of the said circuit court, and that the same which I transmit,
46 constitutes my return to the annexed writ of error, lodged and filed in my office on the twenty-fifth day of April, 1899. I also hereto annex and transmit herewith the original citation in said action.

I further certify that no opinion of the court was rendered or filed in said action.

I further certify that the costs of preparing and certifying the foregoing transcript of record is the sum of $18.95, and that the same has been paid me in full by Struve, Allen, Hughes & McMicken attorneys for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this eighth day of May, 1899.

A. REEVES AYRES, *Clerk,*
By SAM'L D. BRIDGES,
Deputy Clerk.

[SEAL.]

[Cancelled 10-ct. int. rev. stamp.]

Writ of Error (Original).

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Tine Cohen, plaintiff, and The
47 Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said, The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we, being willing

that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-fourth day of May, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

48 The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[SEAL.]

Received this twenty-fifth day of April, 1899, a true copy of the foregoing writ of error, for defendant in error Tine Cohen.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

(Endorsed:) Original. No. —. In the United States circuit court of appeals for the ninth circuit. Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Tine Cohen, defendant in error. Writ of error. Filed in the United States circuit court April 25, 1899. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy. Edward Lyman Short, Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error.

Citation (Original).

UNITED STATES OF AMERICA, ss:

To Tine Cohen, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth
49 circuit, to be holden in the city of San Francisco, State of California, on the twenty-fourth day of May, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of Washington, western division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the twenty-fifth day of April, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Attest:

[SEAL.] A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

We hereby this twenty-fifth day of April, 1899, acknowledge service of the foregoing citation at Tacoma, Washington.

S. WARBURTON,
Counsel for Tine Cohen.

50 (Endorsed:) Original. No. —. In the United States circuit court of appeals for the ninth circuit. Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Tine Cohen, defendant in error. Citation. Filed in the United States circuit court April 25, 1899. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy. Edward Lyman Short, Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error.

(Endorsed:) No. 539. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Tine Cohen, defendant in error. Error to the circuit court of the United States for the district of Washington, western division. Transcript of record. Filed May 15, 1899. F. D. Monckton, clerk.

At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

51 THE MUTUAL LIFE INSURANCE COMPANY OF New York
v.
TINE COHEN. } No. 539.

Order of Submission.

Ordered cause argued by John B. Allen and R. C. Strudwick, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendant in error, and submitted to the court for consideration and decision.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW York (a Corporation), Plaintiff in Error,
v.
TINE COHEN, Defendant in Error. } No. 539.

Opinion U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, western division.

Edward Lyman Short, and John B. Allen, for plaintiff in error; Struve, Allen, Hughes & McMicken, of counsel.
S. Warburton, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

52 HAWLEY, *District Judge:*

This action is brought upon a policy of insurance issued to Alexander Cohen June 10, 1885, for three thousand dollars, made payable in case of his death to his wife Tine Cohen, the defendant in error herein. Endorsed and printed upon the notice of the application for the policy is the following notice to applicants and policy-holders: "No policy-holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company, in consequence of their non-reception." All the premiums upon this policy were paid up to June 11, 1892, and one-half of the annual premium due for the year commencing on that day was paid. No other premiums were paid.

Alexander Cohen died September 21, 1897. Judgment was rendered in favor of defendant in error for $2,671.41. The facts alleged in the pleadings, and the ruling of the court thereon bring the case within the principles announced in The Mutual Life Insur-

ance Company *v.* Hill, *ante*, and upon the authority of that case, and of the authorities cited therein, the judgment of the circuit court is affirmed, with costs.

(Endorsed:) Opinion. Filed Oct. 2, 1899. F. D. Monckton, clerk.

53 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *v.* TINE COHEN, Defendant in Error. } No. 539.

Judgment U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, western division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, western division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed Oct. 2, 1899. F. D. Monckton, clerk.

54 At a stated term, to wit, the October term, A. D. 1899, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* TINE COHEN. } No. 539.

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, ordered mandate herein stayed until the further order of the court.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, v. TINE COHEN, Defendant in Error. } No. 539.

Clerk's Certificate to Transcript, U. S. Circuit Court of Appeals.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing
55 fifty-four (54) pages, numbered from one (1) to fifty-four (54) inclusive, to be a full, true and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, and the order staying mandate in the above-entitled cause, as the originals thereof remain and appear of record in my office, and that the same together constitutes a copy of the entire record of the case in said United States circuit court of appeals for the ninth circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this fourteenth day of October, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 14, '99. F. D. M.]

L

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and Tine Cohen is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of February, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 454, October term, 1899. The Mutual Life Ins. Co. of New York *vs.* Tine Cohen. Writ of certiorari. Filed Feb. 15, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and Plaintiff in Error,
vs.
TINE COHEN. } No. 539.

Stipulation as to Return of the Writ of Certiorari.

It is, this 16th day of February, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause, heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court, and may be received and considered by that court as the transcript of the record in said cause as though the same had been returned by the clerk of the circuit court of appeals for the ninth

circuit in obedience to the writ of certiorari granted February 6th, 1900.

STRUVE, ALLEN, HUGHES & McMICKEN, AND
STRUDWICK & PETERS.
Attorneys for Petitioner and Plaintiff in Error.
S. WARBURTON,
Attorney for Respondent and Defendant in Error.

(Endorsed:) Stipulation as to return to writ of certiorari. Filed Feb. 20, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation entered into between the respective counsel, filed in the cause entitled The Mutual Life Insurance Company of New York, plaintiff in error, *v.* Tine Cohen, defendant in error, No. 539, as the original thereof remains of record in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
v.
TINE COHEN, Defendant in Error.
} No. 539.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 16th day of February, 1900, the

original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

Seal United States Circuit Court of Appeals, Ninth Circuit.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

[Endorsed:] Case No. 17,568. Supreme Court U. S., October term, 1899. Term No., 454. The Mutual Life Ins. Co. of New York *vs.* Tine Cohen. Writ of certiorari & return thereto. Office Supreme Court U. S. Filed Mar. 10, 1900. James H. McKenney, clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PETITIONER.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PLAINTIFF IN ERROR, vs. TINE COHEN, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of the MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows :

I.

That your petitioner is a mutual life insurance company, created and chartered under and by virtue of an Act of the Legislature of the State of New York, of April 12th 1842, entitled: "An act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York.

That in the year 1892 the Legislature of the State of New York, enacted a general statute (Laws 1892, Chap. 690), as follows:

"Sec. 92. No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this State shall declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation,

or to a duly appointed agent or person authorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

If this New York statute governed this policy at all, *which we deny*, then the above act of 1892 governed the premium due dates from December 10, 1892, to December 10, 1896, during which period no premiums were paid.

In 1897 the above act of 1892 was amended as follows:

CHAP. 218.

Became a law April 8, 1897, with the approval of the Governor. Passed, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * *

"SEC. 92.—NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in pay-

ment of any premium, installment or interest declare forfeited or lapsed,—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term of insurance contract for year or less, nor shall any such policy be forfeited, or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been dnly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or

lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. This act shall take effect immediately."

If this New York statute governs the policy at all, *which we deny*, then the above act of 1897, governed the premium due dated June 10, 1897, when no premium was paid. Cohen died September 21st, 1897, and suit was not begun until November, 1898, more than *seventeen* months after the default in June, 1897.

II.

Your petitioner states that shortly prior to June 10th, 1885, one Alexander Cohen, of Butte, Montana, made application in writing to your petitioner, for insurance upon his life in the sum of Three Thousand Dollars, and his application contained the following provision :

" This application is submitted to the said company with the following express covenants and agreements :

" 1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company and the first premium thereon actually paid du-

ring the continuance of the life proposed for insurance in the same condition of health as described in the application."

In pursuance to this application a policy was issued and delivered to the insured at Butte, Montana.

The following, excepting provisions of the contract not affecting this case, is substantially a copy of the policy :

" In consideration of the application for this policy, and of the truth of the several statements made therein, and of the premiums hereinafter specified, promises to pay, at its home office in the City of New York, unto Alexander Cohen, of Butte City, in the County of Silver Bow, State of Montana, fifteen hundred dollars, on the tenth day of June, in the year 1905, if then living, at its said office of the company in the City of New York, or if he should die before that time, then in like manner to pay the sum of three thousand dollars to his wife, Tine Cohen, if living, and if not living, then to their children, their executors, administrators or assigns (any indebtedness to the company on account of this contract to be first deducted therefrom), within sixty days after satisfactory proof at its said office of the death of said Alexander Cohen during the continuance of this policy, upon the following conditions :

" First. The ——— annual premium of eighty-nine dollars and sixty-one cents shall be paid in advance to the company, at its home office in the City of New York, on the delivery of this policy, and thereafter on the tenth day of June in every year during the continuance of this contract.

" Second. The insured shall not transgress the limits of residence and travel prescribed on the back of this policy, which are hereby referred to and made part hereof, or engage in any occupation there forbidden, without the consent of the company in writing.

"Third. The company does not insure against self-destruction in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured.

"Fourth. If this policy shall become void, all payments previously made upon it shall be forfeited to the company; but, if such forfeiture shall occur by nonpayment of premium, after three full annual premiums have been pain, the company will, upon surrender of this policy, within six months after such forfeiture, issue a paid-up policy for a fixed sum computed according to the legal standard of the State of New York.

"Fifth. Proofs shall be furnished to the company as soon as possible after the death of the insured in such form and containing such statements as the company shall require under its general rules.

"Sixth. Any claim under this policy shall be presented in writing to the company, at its home office, in the City of New York, accompanied by a statement of the Court in which the same is to be prosecuted if not settled, at least sixty days before any action shall be commenced thereon, to the end that the same may be settled amicable. And, in case such claim should arise after the death of the insured, any action thereon shall be commenced in one year thereafter.

"In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the City of New York, the tenth day of June, A. D., one thousand and eighty-five.

"ROBT. A. GRANNISS, Vice President.

"ISAAC S. LLOYD, Secretary.

* * * * * * * *

"NOTICE.

"Payment of Premiums: All premiums are due and payable at the home office of the company in the City of New York; but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived;"

Premiums were paid on the policy to the 11th day of June, 1892, when the semi-annual premium for the half year beginning on that date was paid. All subsequent premiums remained unpaid when said Alexander Cohen died September 21, 1897, at Rossland in British Columbia.

III.

Your petitioner further states that after the death of the said Alexander Cohen and *on the 9th of November, 1898*, Tine Cohen, the wife of deceased, the beneficiary in the policy, began an action against your petitioner to recover Three Thousand Dollars, the amount of the policy, with interest, in the United States Circuit Court for the District of Washington, Western Division, in her complaint setting forth the policy and alleging compliance with its terms on the part of the insured during his life time, and on her part subsequently.

Your petitioner in its answer admitted the execution and delivery of the policy, but denied it was delivered or entered into the City of New York, and controverted compliance with the terms of the policy on the part of the insured or defendant in error, and asserted as a defense that

the application for the policy, which by its terms constituted a part of said policy, contained the following express agreement:

"1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application."

And further alleged that the policy, which was the same in the complaint set forth, contained the following provision:

"NOTICE.—Payment of Premiums: All premiums are due and payable at the home office of the company in the City of New York; but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

And further alleged that there was printed upon, and constituted a part of the policy, the following:

"Third. No policy holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

And further alleged that the said Alexander Cohen paid the premiums due on said policy up to the 10th day of June, 1892, and on the 11th day of said month made

payment of the semi-annual premium for the ensuing half year beginning on said day, but thereafter wholly neglected, failed and refused to pay any other or further premium, or part of a premium upon said policy, and that no payment whatever was made by or on behalf of the said Alexander Cohen of any annual or semi-annual premium due on said policy thereafter, but that the same was suffered to lapse and become forfeited; and by reason of said defaults the said policy did become forfeited, lapsed and void, and was so declared by your petitioner.

Your petitioner further states that a demurrer having been filed to its said answer, the same was sustained by the said Circuit Court, and your petitioner, electing to stand upon its answer, judgment was entered against it for $2,671.41, with interest and costs, but your petitioner feeling aggrieved by the judgment of said Circuit Court, applied to the Circuit Court of Appeals for the Ninth Circuit for a writ of error for the correction of the manifest errors that had happened, to the damage of your petitioner as shown by the records and proceedings, as well as in the judgment of said cause, and a writ of error was issued out of said Circuit Court of Appeals, and upon the return of said writ the said cause was argued before the said Circuit Court of Appeals, and thereafter and on the 2d day of October, 1899, the said Circuit Court of Appeals affirmed the judgment of the said Circuit Court.

IV.

Your petitioner states that upon the face of the record of said cause, as the same is on file and as presented in said Circuit Court of Appeals, and by the assignment of error made and presented by your petitioner in the Circuit Court of Appeals, the following questions were and are in issue and involved in the adjudication of said case:

FIRST.

Whether the contract of insurance upon which the action was brought was a contract entered into and governed by the laws of Montana or the laws of New York, and whether the statute of the State of New York of 1892 and 1897 requiring notice to be given, applies to this case or at all in the States of Montana or Washington.

SECOND.

Whether actual notice on the part of the insured obviated the necessity of the statutory notice, the insured not being a resident of the State of New York.

THIRD.

Whether the parties were competent to agree, in a policy of insurance delivered and taking effect in the State of Montana, that no other notice than that contained in the policy of the due date of premium should be given or required.

FOURTH.

Whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by the said general acts of 1892 and 1897.

FIFTH.

Whether even if the Statute of 1892 applied at all it

did not apply only to the premiums due respectively June 11th, 1893, 1894, 1895 and 1896, and whether the Statute of 1897 did not apply to the premium due June 11th, 1897, and whether if the Statute of 1897 applied to the premium due June 11th, 1897, there was no obligation to send any notice because Cohen was not a resident of the State of New York.

SIXTH.

Whether, in event the statute of New York should be held to apply to this case, an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

SEVENTH.

Whether defendant in error can plead as her cause of action the policy of insurance and performance of its terms and conditions upon the part of the insured, and after having admitted non-payment of the premiums, recover because your petitioner failed to allege the termination of the contract by giving the notice prescribed by the statute of New York.

EIGHTH.

Whether such recovery does not constitute a fatal departure from law to law.

NINTH.

Whether defendant in error, in order to avail herself

of the New York statute, would not have been required to bring her action within one year after default was made in the payment of premium as provided in the amendment of April, 1897, of the New York statutes, the action having been commenced on the 9th day of November, 1898, more than one year from June 11, 1897, the last premium due date before death.

TENTH.

Whether under the charter of the defendant company and the Statutes of the State of Montana or Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

V.

Your petitioner states that it has issued and now outstanding in the different Territories and States of the Union many thousands of life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and other life insurance corporations, created and organized under the laws of the State of New York, have entered into and now have outstanding large numbers of similar policies in such States and Territories. That at the time of rendering its opinion in this case the Honorable Circuit Court of Appeals rendered similar opinions and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error and that another case in which your petitioner is plaintiff in error has been submitted to the said Circuit Court of Appeals, involving the same questions, and a number of similar cases are now

pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount of money involved in said cases, and in view of the difference in judicial opinions respecting a number of the questions involved in the cases, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court, upon a full and fair presentation of the merits of the case (or so much of them as the Court may direct) on the part of your petitioner and the said defendant in error, Tine Cohen. The Phinney case (No. 12) in this Court involves kindred statutes.

VI.

Your petitioner states that a certified copy of the entire record in said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application, in conformity to Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, certifying the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* Tine Cohen, defendant in error, No. 539," to the end that the said cause may be reviewed and determined by this Court as provided by Section 6 of an Act of Congress, entitled: "An Act to Establish Courts of Appeals

and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," approved March 3, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court;

And your petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF NEW YORK. }

EDWARD LYMAN SHORT, being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the Petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit. That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me this 18th day of November, A. D., 1899.

ALFRED MACKAY,
(SEAL.) Notary Public,
New York Co.

1864

No. 454 157

Sy. of Short, Davies, Allen, Strudwick for Pet.

454

Filed Nov. 20, 1899.

Supreme Court of the United States,

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. TINE COHEN, Defendant in Error.

BRIEF OF PETITIONER

EDWARD LYMAN SHORT,
JULIEN T. DAVIES,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. TINE COHEN, Defendant in Error.

BRIEF OF PETITIONER.

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered by special act of the Legislature of that state, in June, 1885 insured the life of Alexander Cohen by a policy in the sum of three thousand dollars. At the time of taking the insurance Cohen was a citizen of Montana, residing at Butte. The insurance company was transacting its insurance business in the state, then territory, of Montana. The application for the insurance and the endorsements upon it, were a part of the contract. The application contained the following provision:

"This application is submitted to the said company with the following express covenants and agreements:

"1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said

company and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application."

(Petition, p. 4.)

Among the endorsements upon the policy is the following:

"All premiums are due and payable at the home office of the company in the city of New York, but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived."

(Petition, p. 6.)

The following notice was also printed upon the policy:

"Third. No policy holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

(Petition, p. 7.)

The policy provided for the payment of annual premiums, but agreeably to the regulations of the company, the payments were altered to semi-annual. The premiums were paid to the 10th of June, 1892, and on the 11th day of said month the semi-annual premium for the ensuing half year was paid, but no premium was paid after that date, all subsequent premiums remaining unpaid at the death of said Alexander Cohen, September 21st, 1897, at Rossland, British Columbia. On the 9th of November, 1898, after the death of Alexander Cohen, Tine Cohen, wife of the deceased and beneficiary in the policy, began action against The Mutual Life Insurance Company to recover

three thousand dollars, the amount of the policy, with interest, the action being in the United States Circuit Court for the District of Washington, Western Division. In her complaint she set forth the application and policy, with the endorsements thereon, as her cause of action, alleging compliance with the terms of the contract on the part of the insured during his lifetime, and on her part subsequently.

(Petition, p. 6.)

The Mutual Life Insurance Company in its answer admitted the execution and delivery of the policy, but denied that it was delivered or entered into in the state of New York, and controverted compliance with the terms of the contract on the part of the insured or the defendant in error, and asserted as a defense that the application for the policy which by its terms constituted a part of the policy, contained the following agreement:

"1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application."

And further alleged that the policy, which was the same in the complaint set forth, contained the following provision:

"Notice that each and every payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

(Petition, p. 7.)

It was further alleged that there was printed upon and constituted a part of the policy, the notice hereinbefore quoted, that "no policy holder must expect to be notified when his premium will be due;" and further alleged that said Alexander Cohen

paid the premiums on the policy up to the 10th day of June, 1892, and on the 11th day of said month made payment of the semi-annual premium for the ensuing half year beginning on that day, but thereafter wholly neglected, failed and refused to pay any other premium or any part thereof upon the policy, and that no payment whatever was made by or on behalf of the said Alexander Cohen of any annual or semi-annual premium, but the same was suffered to lapse and become forfeited; that by reason of the defaults of the insured, the policy did become forfeited, lapsed and terminated, and was so declared by the insurance company. A demurrer was interposed to this answer as a whole and to each of the defenses separately, and sustained by the Circuit Court. The plaintiff in error electing to stand upon its answer, judgment was entered against it for two thousand six hundred and seventy-one and 41-100 dollars, with interest and costs. The plaintiff in error feeling aggrieved by the judgment, appealed to the Circuit Court of Appeals for the Ninth Circuit for a writ of error, which was issued, and the cause heard before the Circuit Court of Appeals, which, on the 2nd day of October, 1899, affirmed the judgment of the Circuit Court.

Upon the foregoing brief statement of facts, which are more fully set forth in the petition, petitioner asks this court to grant a writ of certiorari.

ARGUMENT.

We present the following reasons why a writ of certiorari should be granted by this Court under Section 6 of the Act of March 3rd, 1891, (*26 Stats. at Large, 826*) requiring the record and cause to be sent up to this Court for its consideration:

THE STATUTE OF NEW YORK RELATING TO FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THAT STATE IS NOT OPERATIVE BEYOND THE STATE OF NEW YORK.

By the terms of the statute it applies alike to foreign and domestic corporations. Its language is: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy." The language employed respecting the foreign corporation measures the authority assumed as to the domestic corporation. It is a regulating statute as to business done in the state of New York and not beyond its boundaries. It is a statute outside of the contract of insurance, recognizing the contract as being complete in itself, independently of the statute. The further provision that proof of the sending or mailing of the notice may be established by the affidavit of an officer of the corporation, which shall be presumptive evidence that such notice was given, demonstrates that the statute was one designed to operate upon persons within the state of New York.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

(Petition, p. 3.)

It is not within the competency of the legislature of one state to enact rules of evidence for the use of another state or government.

Wharton, in his Conflict of Laws, says (Sec. 752, 2nd Ed.):

"There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case. * * * On the one side, every case must be governed by the law in which it has its seat. On the other side,

the court, in which such case comes to be tried, must direct its own procedure."

In 2nd Parsons on Contracts, 7th Ed., p. 718, the rule is thus stated:

"But on the trial, and in respect to all questions as to the forms, or methods, or conduct of process, or remedy, the law of the place of the forum is applied."

It is thus seen the statute is one of public policy for the state of its enactment, establishing rules of evidence to be applied so far as the law itself extends. The conceded object of this statute is to relieve the negligent and improvident policy holder from the consequences of his carelessness in failing to pay the premiums upon his policy as they fall due. Taking into consideration the date of the enactment of the statute, 1876, and the condition of the mail service throughout the United States at that time, the period of thirty days fixed as sufficient for advising the holder of a policy of the due date of his premium and affording him opportunity of making payment of the same at the home office in New York City, would render the statute effectual for the purpose for which it was designed, if limited to the state of New York, but totally ineffectual, for practical purposes, if extended to all other parts of the United States. It will not be presumed that the legislature recognizing the evil to be remedied, would stop short of an ample relief.

THE STATUTE OF NEW YORK DOES NOT ENTER INTO THE CONTRACT OF INSURANCE, NOR INTO THE CHARTER OF AN INSURANCE COMPANY CREATED UNDER THE LAWS OF THAT STATE.

It is manifest the contract of insurance is complete without reference to this statute. The statute left the parties free to make such contract as they saw fit. No limitation is placed upon their right of contract. It is not until a breach has occurred in the non-payment of premium that the statute be-

comes applicable. It is against the consequences of a breach of the contract that it purports to afford relief. The legislature is at liberty to repeal such statutes without disturbing vested rights. If enacted, they come by way of grace; if repealed, they leave the parties standing upon their contracts as they have seen fit to enter into them.

In *Rosenplanter v. Provident Savings Life Assur. Soc. of New York*, 91 Fed., 728, Hammond, J., speaking of this statute and others of the same nature, says:

"They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the state of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may withdraw it; and it is a mistake to suppose that the right to it becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time."

In affirming the case of *Rosenplanter v. The Provident Savings Life Assurance Society of New York* (96 Fed., —), the Circuit Court of Appeals meets the question as follows:

"But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to forfeiture without

the statutory notice, as such repeal or amendment would impair the obligation of the contract.

"To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. * * *

"Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an impairment of vested rights. *Conn. Life Ins. Co. v. Cushman*, 108 U. S., 51-65; *Ewell v. Daggs*, 108 U. S., 143; *Gross v. United States Mortgage Co.*, 108 U. S., 477; *Butler v. United States B. & L. Ass.*, 97 Tenn., 679; *Curtis v. Leavitt*, 15 N. Y., 15, 85; *Lewis v. McElrain*, 16 Ohio, 347; *Trustees v. McCaughy*, 2 Ohio St., 152; Cooley, Const. Lim., sides pages 293-378.

"Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying:

" 'If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It

was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

"'Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.'"

In the case of *Ewell v. Daggs,* 108 U. S., 143, it was held that the repeal of the statute of Texas which made contracts void for usury, acted retrospectively and took away the right of the defendant to make the defense of usury, but that such a repeal was not legislation impairing the obligation of contracts. Mr. Justice Matthews uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally

decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * *

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract." (pp. 150-151.)

In *Gross v. U. S. Mortgage Co.*, 108 U. S., 477, construing a statute which gave validity to a contract otherwise invalid, this Court, through Mr. Justice Harlan, says:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

It is thus seen the statute of New York does not enter either into the contract of insurance or the charter of the insurance

company. The statute being one of remedy and of public policy, cannot extend beyond the borders of the state of New York. If it enters into a contract made outside of New York or comes by way of remedy for its breach, it does so as a stipulation of the parties, and not by the authority of the legislature. By the terms of this policy it did not become a contract until it was delivered at Butte, Montana, where the first annual premium was paid. This marks the radical difference between business done or a contract made by the insurance company in the state of New York and outside of that state. In the one case the policy of the law which is omnipotent, enters into the contract and controls the parties to it, while in the other, neither the statute nor its policy have a place, and therefore, as a statute and as a policy, it cannot enter into the contract or transaction.

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The court adopted the view that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums.

(Record, p. 52.)

It is true the application recites that it was made subject to the charter of the company and the laws of New York, and that payments are to be made at the home office of the insurance company. But it stands admitted that the insured was from the time of making his application and the delivery of the policy, a citizen and resident of Montana; that his written application for insurance was made and delivered to the company's

agent at Butte and by him transmitted to the New York office; that the policy of insurance was transmitted to the agent at Butte, and upon the payment there of the first annual premium was delivered to Cohen; that the contract expressly provided that it should not take effect until "the first premium shall have been paid and the policy shall have been delivered."

The case in each of the elements going to determine where the contract was executed and by what law it should be governed, is substantially like that of *Equitable Life Assurance Society v. Clements, 140 U. S., 226*, where Justice Gray summarized the case substantially as follows:

The assured was a resident of Missouri and the application was signed there; the policy was executed at the company's office in New York and provided that the contract was set forth in the application and policy taken together. The application declares the contract shall not take effect until the first premium has actually been paid during the life of the assured. The two premiums were paid in Missouri. The answer admits the payment of the premiums and the petition alleges the policy was delivered in Missouri to the assured. The opinion then proceeds:

"Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri." *(P. 232.)*

Unrestricted freedom of contract is conspicuously made manifest in this policy; whatever else may be doubtful, there is no uncertainty left in respect to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy

and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums.

In the case of *Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397*, the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." *(P. 458.)*

The *Brantford City, 29 Fed., 373*, is forcibly in point. A contract was made at Boston with local agents of the British Steamship Company, by the terms of which libelants were to ship cattle on a British steamer from Boston, and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board of a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the laws of England.* * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by

these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort or for the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. United States, 6 Pet., 83, 172, 203.
Scudder v. Union Nat'l Bank, 91 U. S., 406.
The Pennsylvania Co. v. Wm. Fairchild, 69 Ill., 260.
McDaniel v. The Chicago & N. W. Ry. Co., 24 Iowa, 412.

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING OR OFFERING TO PAY DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450,* and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is

in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurrent and independent."

Loud v. Land Co., 153 U. S., 564.
Phillips Co. v. Seymour, 91 U. S., 646 (650).

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. Statham, 93 U. S., 24 (30).
See also Kellner v. Ins. Co., 43 Fed., 623 (627).

Notwithstanding the New York statute, therefore, and even if it be held applicable to this contract, there became due from Mr. Cohen to the company June 11th, 1892, and each succeeding year, including 1897, the premium of $98.61, and such premiums, except one-half of said premium falling due June 11th, 1892, which was paid on that date, remained due at the beginning of this action.

Thompson v. Ins. Co., 104 U. S., 252 (260).
Insurance Co. v. Unsell, 144 U. S., 439 (447).

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has heretofore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstance relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now the question to be solved here, is whether the special act of the legislature of the state of New York of April 12th, 1842, entitled "An Act to incorporate The Mutual Life Insurance Company of New York," is affected by the general statute relating to insurance corporations transacting business in the

state of New York. (See Petition, p. 2.) This special act of the legislature is the charter of the corporation; it is the fundamental law which governs it, except so far as the same has been altered by statutes properly passed. It is true that Section 18 of this act provides that the legislature may at any time alter or repeal this act; but it never had altered or repealed it, except in 1851, when it passed an amendment to the act, which is of no importance here, and afterwards, in April, 1862 when it passed another amendment to the act which is of no importance in this case. No other act has ever been passed by the legislature of the state of New York amending the special act of the legislature to incorporate The Mutual Life Insurance Company of New York. Certainly the general statute cited in the petition does not alter the charter of this company; certainly it does not decrease its power; certainly it cannot affect any of its rights under the contract which it made with the state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected, indeed, to the general provisions of law under the police power which the state has a right to enact.

THE PENAL CONSEQUENCES RESULTING FROM OBEYING THE NEW YORK STATUTE WILL NOT BE ENFORCED IN ANOTHER STATE.

This company is required by the statute to send a notice of the coming due of each installment of premium to the policy-holder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the state of Washington going to enforce the penal laws of the state of New York, and collect from its disobedient cor-

porations the sums which they have been muleted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the insurance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marhsall, 15 Ohio St., 543.

MEANING OF THE STATUTE OF NEW YORK.—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED?

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or

trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was entitled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of the premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable, the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed of actual notice, his excuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a

wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, annual, or semi-annual, or quarterly installments of premium are paid to the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment period to another; although there is that sort of insurance, called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing (the application) made in Butte, in the state of Montana, immediately prior to the 10th day of June, 1885, signed by Alexander Cohen, and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as *an* inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision:

"If this policy shall become void, all payments previously made upon it shall be forfeited to the company."

Now, here is the forfeiture which the statute refers to, this is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to seven years' premiums, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is

forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case seven years' premiums have been paid. To do equity between the parties, you must deduct from those seven years' premiums the cost of carrying the insurance for seven years as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See Record, p. 4.)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company v. Statham, 93 U. S., 24. The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition of the country, being in a state of war with the southern states.

Says the court in that case:

"Non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforseen exigencies of war, he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice.

This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Cohen did in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in June, 1893, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1894. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Cohen would have had to pay the premium within thirty days, which is just what he wanted to avoid.

A FATAL DEPARTURE FROM LAW TO LAW WAS MADE IN RENDERING THE JUDGMENT SOUGHT TO BE REVIEWED, BECAUSE THERE ARE NO PLEADINGS FOR SUCH A JUDGMENT TO BE BASED UPON.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performance, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. Provident Sav. Life Assur. Soc., 91 Fed., 728.

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of departure

from law to law in the pleading. Whether a party who pleads a specific contract and performance on his part of its conditions as his right to recover shall be permitted after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign state and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by the defendant in error, affords the ground of recovery, then pleading of the statute is indispensable.

Union Pacific Railway v. Wyler, 158 U. S., 285.

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow servant act of the state of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice White in delivering the opinion of the court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a*, says: 'When a man in his

former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader,' (F. 8,) states the same rule, and gives the following illustrations of departure:

" 'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine v. Irwin, M. 4 G. 2, C. B. Fort. 368.*

" 'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on Pleading, *1, pp. 674, 675,* states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412, 413,* thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (a) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder.'

"Gould on Pleadings, *pp. 423, 424,* ays:

"'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure.' *(pp. 290-291.)*

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other states are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363; Hempstead v. Reed, 6 Connecticut, 480; Swank v. Hufnagle, 111 Indiana, 453; Root v. Merriweather, 8 Bush, 397.* Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. Babcock, 46 Missouri, 243.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this

predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judicial notice of the laws of the several states. *Priestman v. United States, 4 Dall. 28; Owings v. Hull, 9 Pet. 607; Corington Drawbridge Co. v. Shepherd, 20 How. 227; Cheever v. Wilson, 9 Wall. 108; Junction Railroad v. Bank of Ashland, 12 Wall. 226.* This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." *(pp. 295-296.)*

The preserved distinction between legal and equitable remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in some form, of the premiums with which the insurance is purchased; it is not claimed that failure to give the statutory notice operates as a payment. How then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the

forum of the state of New York, and render its judgment or decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle-aged person immediately upon the enactment of the statute of 1876, and but a single annual premium paid, and death occurred about this time and an action should be brought upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable setoff exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in its favor?

IN THIS CASE THERE WAS NOT UNDER ANY ASPECT OF THE MATTER ANY OBLIGATION TO SEND NOTICE IN 1897, AND RECOVERY IS SHUT OUT BY THE AMENDMENT OF 1897 TO SECTION 92 OF CHAPTER 690 OF THE LAWS OF NEW YORK OF 1892.

(*a.*) Whether the Act of 1897 be regarded as a new law, or simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8th, 1897, no notice had to be sent to Cohen as he was not a resident of the State of New York.

This act provides that the notice shall be mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, "at his or her last known post-office address in this State," that is, New York.

This act took effect April 8th, 1897, and Cohen was alive on June 11th, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplaenter case, herein-

after cited, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Cohen, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the plaintiff, if Cohen was sent no notice on December 10th, 1892, and did not pay his premium at that time, his policy was not void and forfeited; but on this theory the failure to send a notice could not possibly carry the policy any further than the payment of a premium would have carried it; so that on the theory of the plaintiff by successive failures to send notices, in 1893, 1894, 1895 and 1896, his policy was carried in force up to June 10th, 1897, but at that time, the defendant was obliged to send no notice, and that if he failed to pay his premium, then the policy was forfeited and lapsed, even on the theory of the plaintiff.

In connection with this point (*a*) see discussion of effect of statute under (*b*).

(*b.*) Under the Act of 1897, if there is a controversy as to whether a premium is forfeited or not, such an action must be begun to determine such controversy within one year from the date of the default in the payment of the premium. In this case the final default was on June 10th, 1897, and no suit was begun until November 9th, 1898, some seventeen months afterwards. The final default took place June, 1897. After the final default Cohen, until his death, September 21st, 1897, and his executors thereafter, until June 10th, 1898, had the right to litigate the propriety of such default, but not having done so their right to do so is barred. The reason upon which the statute is based clearly is that policy holders must pay their pre-

miums on their due date, or must before a second premium becomes due, litigate any question of forfeiture arising out of the non-payment of the previous premium.

The policy was issued June 10th, 1885, when the first annual premium was paid, but no part of any premiums subsequent to June 11th, 1892, has ever been paid or tendered. The insured, Alexander Cohen, died September 21st, 1897. Action was commenced November 9, 1898. (Record, p. 10.) It is thus seen that no premium had been paid for five years previous to the death of the insured, or for more than that time previous to the commencement of this action. It will be borne in mind that the express stipulation of the contract is, that non-payment of the premium when due renders the policy void. If, then, a right of recovery exists, it must be through the statute of New York, and upon the terms prescribed by the statute, and the suit must be brought within the time prescribed by the law which constitutes a part of the statutory right. It is through the grace of the legislature of New York that the right of action upon the forfeited policy is given, if at all, and one who relies upon it must bring himself within the terms of that statute; one of which is the time of taking advantage of the favor it bestows.

The amendment by Chapter 218, Laws of 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued." (Petition, pp. 3 and 4.)

Though it be held that the policy remained alive for want of the statutory notice, it is none the less true that

default was made in payment of the premiums due in each of the years 1893, 1894, 1895, 1896 and 1897, and has so continued to this date. The legislature of New York, as has been shown, did not touch the contract and its obligations, and did not enter into the charter of the company. This statute would, in case the business was transacted in the state of New York, relieve the insured against the consequences of a violation of his contract. By the express stipulation of the policy it became lapsed and forfeited by the non-payment of the premium when it fell due; but notwithstanding such forfeiture, the insurance company was forbidden to take advantage of it and declare the contract forfeited and lapsed, unless it mailed a certain notice; although the forfeiture had occurred, the company was, in a case where the statute applied, prevented from availing itself of that forfeiture or declaring it, till a proper notice was mailed. The insured did not pay his premium in the company's failure to give the notice. He was only relieved from the consequences of his violated contract. It is none the less, by its own terms, a forfeited policy, though the insurance company is not permitted to declare it such without first mailing the statutory notice. The language of the statute is: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed." (Petition, p. 2). The "forfeited policy" in contemplation of the amendment of April, 1897, is that policy upon which the premium has not been paid according to its terms, and such is the forfeited policy in the sense of the statute amended.

This view of the statute is clearly brought out in *Rosenplanter* vs. *Provident Savings Life Assur. Society* before cited, 96 Fed., p.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in and in effect said: 'You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums unless you first comply with this statute by giving the notice herein required.' The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions."

If it should be claimed that the policy was issued prior to the amended statute of 1892, and therefore that statute and its amendment of 1897 are not applicable, the objection is met by the fact that it was "renewed" after the enactment of 1892. Without the payment of the annual premium the policy lapses, but by means of such payment it is restored, reinstated, continued, or, in the language of the statute, renewed; such is the interpretation given by the Courts of New York to this word as employed in the statute.

We quote from *Carter* vs. *Brooklyn Life Ins. Co.* (*110 N. Y., 15*), *17 N. E. 396*:

"We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was

expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract, or the creation of a new existence. Webst. Dict.; Worcest. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies and confer some legal right upon their holders, to avoid a cause of forfeiture; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

And such is the view adopted in *Rosenplanter* vs. *Provident Life Assurance Co.*, cited from above.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to *renew* the policy by the payment of the stipulated premium."

The right of action being derived through the statute, the time in which it must be brought becomes a part of the statutory right, and unless suit is instituted within such time the right of action is lost.

In distinguishing the rule of limitation with respect to actions given by the common law and those under the statute, in *Finnell* vs. *Southern Kan. Ry. Co.*, *33 Fed.*, *427*, the court says:

"There is also another class of cases in which a cause of action, which does not exist at common law, is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them, and if suit is brought on such causes of action in a foreign jurisdiction the limitation act of the state which created the cause of action may, of course, be pleaded." (p. 428.)

And in *The Harrisburg 119 U. S.*, *199*, this court expresses the rule as follows:

"The statutesc reate a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It

matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." (p. 214).

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We cite as alike in principle the case of *Wabash Western Railway* vs. *Brow*, *164 U. S., 271.* We further call attention to *Saltonstall* vs. *Birtwell*, *164 U. S., 54*, wherein it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment, (though made afterwards and within ten days after the ascertainment and liquidation of duties), and the judgment being affirmed by the Circuit Court of Appeals, this court granted a writ of certiorari, while in the case of "*The Kate*," *164 U. S.. Rep. 458*, certain questions being certified to this court, it caused the whole record to be brought up in order to determine a case involving, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener vs. *Russ*, *162 U. S. Rep., 170*, was an action by Russ, the holder of a contract to purchase large tracts of land from the State of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell* vs. *Grosvenor*, *162 U. S. Rep. 425* a patent infringement case where the decision of the Circuit Court of Appeals is final, as in the other cases cited.

In *The Conqueror*, *166 U. S. 110*, this court issued its writ of certiorari, where the questions were involved as to whether a certain foreign built vessel purchased by a citizen of the United Stares and brought into the waters thereof, was taxable under the tariff laws of the United States, and what was the proper measure of damages suffered by reason of the detention during the time of seizure of such vessel. While In re Chetwood, the court, making the rule absolute in allowing a certiorari where the Circuit Court exceeded its jurisdiction in judging certain parties guilty of contempt in violating the order of the court, made use of the following language (*165 U. S., 443*) :

" By section 14 of the Judiciary Act of September 24, 178 (*1 Stat. 81 c. 20*), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to to the usages and principles of law' ; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. (*Amer. Construction Co. Jacksonville Railway*, *148 U. S.*,) *372*, *380*. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, *c. 517*, *26 Stat. 826*, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice."

Regarding the differences of judicial opinion respecting

a number of the questions raised, and the unsettled rule as to a number of the other questions presented, as well as the importance of a decision affecting a number of cases presented contemporaneously to this court, by petitioner, and still others pending in the Circuit Court of Appeals of the Ninth Circuit, and in the Circuit Court for the District of Washington, in which your petitioner is a party, as well as the importance of a decision affecting numerous outstanding policies of The Mutual Life Insurance Company of New York, and other life insurance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this honorable court to bring the record and cause before it, in order that it may decide the entire matter in controversy, as if the case had been brought before the court by a writ of error.

This court in the case of Phinney, Executors *vs.* The Mutual Life Insurance Company of New York, No. 12 on the present calendar of this court, granted a writ of certiorari, and the Phinney case has been passed for special cause, and will be argued in the spring of 1900. The questions involved in this case are to some extent the same class of questions as those in the Phinney case now before this court, and it is respectfully urged that this is an additional reason for the court having before it at the time the Phinney case is argued, other cases involving the same points.

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Filed Mar. 13, 1900.

No. 154.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

TINE COHEN,

Defendant in Error.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
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PRELIMINARY STATEMENT.

There is no difference between this case and the Phinney case so far as the acts of 1877 and 1892 are concerned, but the questions of estoppel, abandonment, waiver and rescission arise upon the facts admitted by the demurrer, and the effect of the act of 1897, and the express limitation therein to post-office addresses within the State of New York, and the effect of the bar therein are involved herein.

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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. TINE COHEN, Defendant in Error.	No. 454.

Writ of Error to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

PRELIMINARY STATEMENT.

There is no difference between this case and the Phinney case so far as the acts of 1877 and 1892 are concerned, but the questions of estoppel, abandonment, waiver and rescission arise upon the facts admitted by the demurrer, and the effect of the act of 1897, and the express limitation therein to post-office addresses within the State of New York, and the effect of the bar therein are involved herein.

I.

Statement of proceedings in Court below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on 9th day of November, 1898, to recover the sum of three thousand dollars ($3,000) with interest from March 5, 1898, claimed to be due on a policy of life insurance issued by the Mutual Life Insurance Company of New York (Rec., 1, 10).

The answer was demurred to by the plaintiff, and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff Cohen in the sum of two thousand six hundred and seventy-one dollars and forty-one cents ($2,671.41) (Rec., 31).

The defendant excepted to the judgment. Record (31).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment.

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District, and the judgment was there affirmed.

For opinion of Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert and Ross, Circuit Judges (see Record, page 52. Also reported in 97 Federal Reporter, page 985).

In November, 1899, a petition for a writ of certiorari was filed by the defendant company in this Court with a certified copy of the record and brief. This petition and brief were submitted to this Court with brief for Cohen opposing application for certiorari (see papers on file).

Writ of certiorari was thereafter granted by this Court February 5th. 1900 and filed.

This cause now comes before this Court on a writ of certiorari for hearing on the merits.

II.

Abstract of the Pleadings

The Complaint.

The complaint in this action alleges that the plaintiff was a resident and citizen of the State of Washington (Rec. 2), and the application states that Cohen was in 1885 a resident of Montana (Rec. 23). That on the 10th day of June, 1885, the defendant company executed and delivered in the City of New York the policy in question, which was in favor of Mr. Cohen.

The following clauses appear in the policy set forth in in the complaint:

"If this policy shall become void all payments previ-
"ously made upon it shall be forfeited to the company," but if such forfeiture occurs after three years, then a paid-up will be issued (Rec. 3).

The following clauses appear in the application which is a part both of complaint and answer (Rec., 21).

That the application is made "subject to the charter of such company and the laws of said State" (Rec. 22).

That the policy shall constitute no contract of insurance until the policy shall have been delivered and the first premium actually paid (Rec.. 29).

Provision as to paid-up policy in case of forfeiture (Rec., 29).

> "PAYMENT OF PREMIUMS.—All premiums are due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipts signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly

waived, and that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company on account of this contracs and shall be deducted from the amount of the claim."

That on September 21st, 1897, Cohen died in British Columbia (Rec., p. 8).

That during the lifetime of Cohen he duly performed all the conditions of the contract.

That the plaintiff had duly complied with all the conditions of the contract necessary to be complied with.

That the complaint appears sworn to the 19th day of October, 1898, and was duly filed November 9th, 1898.

The Answer.

Plaintiff in error answering admits the issuance of the policy, but denies the contract was made or delivered or the full premium paid in the State of New York, or at any other place than at Butte city, Montana (Rec., 13), and further denies that all the conditions of the contract were performed and alleges affirmatively that the application was made in the State of Montana, the policy delivered in the State of Montana and the first annual premium of $89.61 paid thereon in the State of Montana by Cohen.

That the application for said policy contained the above agreements alleged in the complaint, and also the following agreements alleged in the answer.

"2. The company does not agree to restore a policy after a lapse for non-payment of premium, but when in special cases policies are restored, satisfactory evidence of the insurable condition of the policy must be given.

"3. No policy-holder must expect to be notified when the premium will be due. It is the practice of the company to send these notices as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

The answer further alleged that no premiums subsequent to the semi-annual premium of June 11th, 1892, was paid, and that the policy was by Alexander Cohen suffered to become forfeited, and to lapse.

The Demurrer.

The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense to the complaint. (Rec., 20).

III.

Chronological statement of facts admitted by the pleadings.

1877. Act of 1877 Passed.

1885, June 10. Cohen, a resident and citizen of the State of Montana, executed an application at Butte, Montana, to the defendant company for policy of insurance on his life for the sum of three thousand dollars ($3,000), payable to his wife, if living; if not, to children. This application was forwarded to the home office in pursuance of policies applied for by Cohen, and were issued bearing date 10th day of June, 1885, and forwarded to the home

office in New York to the agent at Butte, Montana, who delivered it to Cohen upon payment of the first premium.

June 11, 1892. Last semi-annual premium paid.
1892, Oct. 1. Law of 1892 went into effect.
1897, April 8. Law went into effect.
1897, September 21. Cohen died.
1898, Nov. 9. Suit commenced.

IV.

Statement of the Case Required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised:

The first question is, whether the Statutes of New York of 1877 and 1892 applied or not to the business of collecting premiums from non-residents which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point I.)

The second question is, whether or not under the circumstances the policy was or was not a Montana contract governed and construed by the laws of Montana alone and not by the Statutes of New York in question. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point II.)

The third question is, whether if such premium notice statutes of New York applies their equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point III.)

The fourth question is, whether or not such premium notice law, as might be applicable to the Cohen policy and the premium due June, 1897, was the Statute of 1897, passed April 5th, 1897. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point IV.)

The fifth question is, whether or not the Cohen policy did not become lapsed and forfeited beyond any question, on June 10th, 1897, by its terms, by reason of non-payment of the premium falling due on that day, because by the express provision of the Act of 1897, no notice was necessary, as Cohen's post-office address was not in the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point V.)

The sixth question is, whether if any statutory notice was required the sending of notice was not waived by Cohen by the terms of the policy, and whether actual knowledge of the due date of his premium, possessed and acted upon by him obviated the necessity of statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VI.)

The seventh question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and rescission and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VII.)

The eighth question is, whether or not it is essential to the maintenance of this action that Mrs. Cohen should have paid or tendered the premiums before suit, and should have pleaded both that fact and the Act of 1892. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VIII.)

V.

Statement of Questions in issue as presented in the petition for the Writ of Certiorari.

FIRST.

Whether the contract of insurance upon which the action was brought was a contract entered into and governed by the laws of Montana or the laws of New York, and whether the statute of the State of New York of 1877, 1892 and 1897 requiring notice to be given, applies to this case or at all in the States of Montana or Washington.

SECOND.

Whether actual notice on the part of the insured obviated the necessity of the statutory notice, the insured not being a resident of the State of New York.

THIRD.

Whether the parties were competent to agree, in a policy of insurance delivered and taking effect in the State of Montana, that no other notice than that contained in the policy of the due date of premium should be given or required.

FOURTH.

Whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by the said general acts of 1892 and 1897.

FIFTH.

Whether even if the Statute of 1892 applied at all it did not apply only to the premiums due respectively June 11th, 1893, 1894, 1895 and 1896, and whether the Statute of 1897 did not apply to the premium due June 11th, 1897, and whether if the Statute of 1897 applied to the premium due June 11th, 1897, there was no obligation to send any notice because Cohen was not a resident of the State of New York.

SIXTH.

Whether, in event the Statute of New York should be held to apply to this case, an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

SEVENTH.

Whether defendant in error can plead as her cause of action the policy of insurance and performance of its terms and conditions upon the part of the insured, and after having admitted non-payment of the premiums, recover because your petitioner failed to allege the termination of the contract by giving the notice prescribed by the Statute of New York.

EIGHTH.

Whether such recovery does not constitute a fatal departure from law to law.

NINTH.

Whether defendant in error, in order to avail herself of the New York Statute, would not have been required

to bring her action within one year after default was made in the payment of premium as provided in the amendment of April, 1897, of the New York Statutes, the action having been commenced on the 9th day of November, 1898, more than one year from June 11, 1897, the last premium due date before death.

TENTH.

Whether under the charter of the defendant company and the Statutes of the State of Montana or Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff in error, and upon which it relies for the reversal of this cause.

I.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error (Assignment of Errors 1, Record, p. 32).

II.

The said Court erred in sustaining the demurrer of the

plaintiff and defendant in error to the answer of the defendant and plaintiff in error (Assignment of Errors II, Record, p. 33).

III.

The said Court erred in granting judgment in favor of plaintiff and defendant in error against defendant company and plaintiff in error for the amount of said judgment, or any sum, because it was manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment (Assignment of errors III, Record, p. 33).

IV.

The said Court erred in not submitting said cause to trial upon the issues formed by the pleadings (Assignment of errors IV, Record, p. 33).

POINT I.

The Premium Notice Statutes of New York 1877 and 1892 never had any application to the Cohen policy, because these statutes did not apply to the business of collecting premiums outside the State of New York. The contract was not subject to these particular laws of the State of New York, because by their true construction they had no application.

The contract was made in Montana, and the insured died in British Columbia. The plaintiff was at all times a citizen, resident and inhabitant of the State of Washington (Rec., p. 2.)

It could not be claimed, if the statute expressly and on its face declared that it applied only to the business of collecting premiums in New York State, that the language of the application was intended to make the New York statute applicable to the business of collecting premiums in Montana or Washington. "Subject to the laws of said State" means only subject to such existing laws as are applicable according to their intent and true construction. The statute operates alike upon foreign and domestic insurance companies doing business within the State of New York. It must be conceded that its effect must be limited upon foreign corporations to their business of collecting premiums within this State since the business of forfeiting policies, if it be a business to make an entry on a corporation's books, could only take place out of the State at the home office of a foreign corporation. Therefore, the act must be confined as to domestic corporations, to the business of collecting premiums in New York State.

For the arguments in support of the above see Phinney Brief, Point II.

A.

The Baxter, Carter, Frommhold and Osborn cases cited by Mr. Warburton support the contention of the plaintiff in error that the Statute of 1877 applies only to the business of collecting premiums within the State of New York, and that such is the true construction of the act.

The Baxter Case. The Baxter case supports the contention of the plaintiff in error because,

1. The premiums were expressly payable by the policy in New York State, and there are no provisions for their payment in Pennsylvania. The Court will find on page 38 of the supplemental brief of the defendant in error a statement of the clause in the policy, which reads as follows :

> "This policy is a contract *made and to be exe-*
> " *cuted* in the State of New York and shall be con-
> " strued only according to the laws of that State
> " and no suit shall be brought against the company
> " upon this policy except in the Courts of that
> " State, or in the Circuit or District Courts of the
> " United States ; nor shall any such suit be brought
> " after the lapse of one year from the time when the
> " cause of action accrues.

2. No allusion whatever was made by counsel or Court in the Baxter case to the point raised here. It was evidently taken for granted in the case that, as the premiums were payable and collectible in New York State the premium notice law, of course, applied to it.

The Carter Case. We have already shown on page 61 of the amended brief that the Carter case is directly in our favor on this point. In that case the plaintiff remitted the premiums directly to the company at New York, and no question whatever was raised in the case that the New York statute did not apply under these circumstances.

The Frommhold Case. In this case the policy was issued in 1890. The defanlt was in 1894, and the Court applied the Statute of 1892. The premiums in this case were, by the policy, expressly made payable in New York, and the notices were mailed in New York. This case also is an authority in favor of the plaintiff in error.

The Osborn Case. The premiums, by the policy, were payable in New York City, and under no circumstances elsewhere. The contract in the policy on this point reads as follows:

> "The Home Life Insurance Company, by this "policy of insurance, in consideration of the an- "nual premium of $174.70, to be paid at its office "in the City of New York, on or before the 4th "day of October, at twelve o'clock noon, in each "and every year during the continuance of this "policy, until twenty annual premiums shall have "been paid, does assure the life," &c.

B.

The Statutes of 1877 and 1892 admit of the construction contended for, and indeed require it.

As we have shown in the main brief, Point II, Subdivisions 1, 2 and 3, pages 44 to 69, the operation of these statutes is necessarily limited to the State of New York.

Whenever a statute refers in general language to all persons, things or acts, two constructions of such language are always open: The words may apply to, first, all persons, things or acts throughout the State; and, secondly, all persons, things or acts throughout the world. As between these two possible constructions the presumption is always in favor of the former.

In the very recent case of State *vs.* Lancashire Fire Ins. Co., 51 S. W. Rep., 633, decided last May, the Supreme Court of Arkansas construed a statute which in general language prohibited any insurance corporation from entering into or becoming a party to "any pool, agreement or contract to fix rates" to mean any pool, agreement or contract made in that State and affecting the people of that State. In the course of its decision, the Court said:

> "Although the legislature may use general "words such as 'any' or 'all' in describing per- "sons or acts to which the statute applies, still it "does not follow that the law has an extra terri- "torial effect; for it is presumed that the legis- "lature did not intend it to have such effect unless "the language of the statute admits of no other "reasonable interpretation. The reports furnish "numerous instances of the application of this rule, "by which general words used in the statutes are

"taken as limited to cases within the jurisdiction
"of the legislature passing the statute, *and con-*
"*fining its operation to matters affecting persons*
"*and property in such jurisdiction.*"

And after citing cases in support, said:

"It is so unusual for a legislature to intend that
"its acts shall have such world-wide effect that
"Courts are never justified in putting such con-
"struction upon them, if their language admits of
"any other reasonable interpretation."

Rosseter *vs.* Cahlmann, 8 Exchequer (W. H. & G., p. 361).

In this case the Court considered a statute which abolished use of certain weights and measures, and provided that "*any* contract, bargain, or sale made by "any such weights or measures, shall be wholly null "and void."

This was interpreted to mean contracts made in England and to be performed in England, and to have no application to contracts, though made in England, which were to be performed elsewhere.

See also Merrill *vs.* Railroad, 63 N. H., 259, 265, where the Court said:

"As a consequence of the equality and sover-
"eignty of states in respect to each other, the laws
"of a state must presumptively be taken as in-
"tended for the government only of persons and
"things within its territory; and consequently,
"the operation of a law is limited to the state
"by which it was enacted, unless the intent to give
"it a more extended operation is clearly indi-
"cated."

In Whitford *vs.* Panama R. R. Co., 23 N. Y., 465, the Court construed a statute which in general words

gave a right of action to the administrator or heir of a deceased person for death caused by negligence. This law was construed to be limited to such causes of action as arose from acts negligently done or omitted within that state.

South Yuba Water Co. *vs.* Rosa, 80 Cal., 333; and
Felton *vs.* West, 102 Cal., 266.

In South Yuba Water Co. *vs.* Rosa, 80 Cal., 333, it was held that Section 299 of the Civil Code providing that *no corporation hereafter formed* shall purchase or hold property in any county in this State without filing a copy of its articles of incorporation with the county clerk, and *every corporation now in existence* must file such a copy with the clerk, etc., applied only to corporations formed or to be formed under the laws of California, and that it does not apply to foreign corporations though doing business in this State.

In Felton *vs.* West, 102 Cal., 266, the Court held that Section 726 of the Code of Civil Procedure, providing that "There can be but one action for the recovery of "any debt, or the enforcement of any right, secured "by mortgage upon real estate or personal property," etc., should be construed to mean that there can be but one action *in this State* for the recovery of any debt secured by mortgage upon property situated *within this State.*

There are two other features of the premium notice statutes which seem to require that their operation should be so limited. The *first* is a limitation as to time in sending the notes. In the acts of 1876 and 1877 the notice must be sent not less than thirty nor more than sixty days before the premium is due. In the acts of 1892 and 1897 they must be sent at least fifteen and

not more than forty-five days prior ; so that the policy-holders may only have two weeks' notice under the act of 1892. The object of the law was to afford protection to the assured by giving him notice. The purpose of the requirement was to secure to policy-holders timely notice of premiums coming due. If a notice is mailed at any time between fifteen and forty-five days before the due date, the contract rights and liabilities of the parties remain unaffected and the forfeiture results *ipso facto* from non-payment.

So far as residents of New York are concerned, the statutory requirements are reasonable, and the protection designed fully accomplished. Fifteen days is sufficient for policy-holders of New York to have notice of the date of their premium, while forty-five days' prohibition prevents notices from being sent too early to give rise to forgetfulness. As we leave New York the length of the notice provided for by the act, of course, diminishes. The statute will be satisfied, of course, by notices sent from the Home Office of the Company, but the time limit in which the statute would be operative out of the State of New York might be in many cases, entirely insufficient. In many cases, and in many localities in this country, and in all foreign countries fifteen days would not give time enough for the policy-holder to receive his notice and remit the premium before its due date.

And here the case of Colquhoun *vs.* Brooks, 14 App. Cases, 504, is relevant, where the Court held that if it could be shown that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in England, it would afford a reason for adopting some other interpretation if it were possible consistently with ordinary canons of construction. The machinery for notice outside New York State is not sufficient, hence not intended.

The *second* consideration is the provision in the Statutes of 1876, 1877, 1892 and 1897, that the affidavit of any Clerk authorized to mail the notice that the notice has been duly addressed and mailed, is presumptive evidence that such notice has been duly given.

If it were not for this statute the proof of service of the notice could only be made by the testimony of a witness who should be produced upon the trial and be subject to cross-examination. This, from a practical point of view, in view of the number of notices sent, &c., would be wholly impracticable.

The Courts must, therefore, either hold that this affidavit can be used anywhere and in any forum, even though it is in violation of the general rule that the Legislature of New York cannot prescribe a rule of evidence that would have any effect outside of that State, or if it holds that the affidavit is only admissible in the Courts of New York State, it would necessarily follow that this would limit the operation of the whole Statute to New York State.

In one of the cases cited by Mr. Warburton, namely, Equitable Life *vs.* Frommhold, 75 Ill., Ap., it has been held that the section relating to the affidavit has no force or effect outside the State of New York.

C.

The question is an open one for this Court.

The real character of this nest of speculative litigations is shown by the following facts :

In the Phinney case *one* premium was paid, and the insured died *three* years after policy issued.

In the Hill case *one* premium was paid, and the insured died *four* years after the policy issued.

In the Allen case *one* premium was paid and the insured died *four* years after policy issued.

In the Cohen case *six* premiums were paid, and the insured died *twelve* years after policy issued.

In the Sears case *two* premiums were paid, and the insured died *seven* years after policy issued.

In the Dingley case (just decided in the Circuit Court of Appeals for the Ninth Circuit) *one* premium was paid, and the insured died *four* years after policy issued.

In the Hathaway case (decided by Hanford, J., January 22, 1900), *one* premium was paid, and the insured died *six* years after policy issued.

The object of the premium notice statute has been variously stated as follows:

In Merriman *vs.* The Keystone Mutual Association, 138 N. Y., 116, Judge MACOMBER, at General Term, said:

> "The statute was undoubtedly passed for the purpose of requiring insurance companies to jog the memory of persons who in ordinary matters are conclusively charged with knowledge of the time when their obligations mature. There seems to be no further purpose in the enactment than that. The Legislature doubtless for a wise public policy determined not to permit a forfeiture, although accomplished by means of the terms of the contract, unless within the period named the party should be actually notified of his obligations to pay."

In the same case, 138 N. Y., 116, at p. 123, EARL, J., referring to the statute of 1877, said: "It clearly has reference only to policies where premiums or interest

become payable at stated times and the purpose of the act is to require the insurers to give the notice so that the policyholder may not lose the benefit of the policy by forgetfulness or misapprehension as to the time of the stated payments."

In Trimble *vs.* The New York Life, 55 *Pacific Reporter*, 429, the Court states:

> "And so we think that the assured must be also bound by a practical construction of the law in this case. While it is probably true that the law was made for the benefit of the assured, it was evidently intended as a reminder to him of the coming due of the premium, so that he might not unawares, or through a fault of memory, allow his policy to lapse, and forfeit his rights under the contract, upon which he had already paid out money; and when the notice which was sent in this case was received by the insured, it seems clear that the object of the law was met, and that his attention was called to the fact that the premium was about to become due, and to the further fact that, if it was not paid within a certain time, it would be forfeited. * * * The evident intention of the law, we think, however, was not to apprise him of the amount which was due, but of the time when the amount became due. While the statute was no doubt enacted for the benefit of people who insured in these cases, the law recognizing the fact that they were not people who were expert or careful in transacting business, yet it evidently was not the intention to make the law operate oppressively upon the insurance companies, but was enacted simply in the interest of justice. While Courts have always been ready to protect the assured from oppressive and technical conditions which are frequently incorporated in insurance policies, and are misleading to the untrained mind, this provision of the law does not need any strained or extended construction to effectuate that protection."

In McDougall *vs.* The Provident Savings Life, 35

N. Y., 551, the Court, in speaking of a notice mailed *prior* to the due date, says :

> "It was intended to and, undoubtedly does subserve a useful purpose, in throwing about the contract between the insurer and the assured reasonable safeguards against a forfeiture or the lapsing of the interest of the assured. * * * The notice was to remind the assured of the privilege he possessed of electing to have the contract continued and extended over the ensuing year and of the conditions of its exercise. * * * The obligation of the statute must not be unreasonably insisted upon. It provides for the giving of a notice, which shall be unambiguous and intelligible to all. * * * The statute was not meant so operate harshly upon the insurer, but to afford a protection to the assured, by the reasonable requirement of a notice, couched in plain terms, from the insurer, before the interest of the assured could be forfeited."

In Carter *vs.* The Brooklyn Life, 110 N. Y., 21, the Court says: "The act should be construed according to the popular signification of the language used and with a view to securing to policyholders and life insurance companies the benefits contemplated by such legislation."

These statutes have thus been declared to be for the purpose of preventing forgetfulness on the part of the insured, and that they should not be construed harshly or oppressively against the insurer; but under the construction of the Ninth Circuit the statute has become an engine of oppression to policyholders who have paid their premiums, and borne the burden and heat of the day, in favor of policyholders who have contributed substantially *nothing* to the fund they are attempting to divert.

The Courts of the State of New York have never sanctioned such doctrine as the above, based as it largely is upon a perversion of expressions used by the New York Courts in stating the nature of the statutes and the extent to which they control insurance contracts.

The New York cases are limited almost wholly to cases where there was a default, without notice, an improper notice, or one not sent in time, and then a death before the next premium became due.

Thus in the Phelan case the default was in December, 1882, and the death in January, 1883. In the Conway case, the default was in October, 1891, and the death was in May, 1892. In the Baxter case, the default was in August, 1884, and the death in September, 1884. In the McDougall case, the default was in July, 1888, and the death in November, 1888. In the DeFrece case, the default was in January, 1889, and the death February, 1889. In the Carter case, there was one default in 1883, and the action was to reinstate the policy.

In the main Phinney brief in Point IV, we have argued that successive defaults were not contemplated by the statute.

Had the Courts of New York decided after presentation of the proposition by counsel that the statutes were applicable outside the State of New York, and operated to continue the insurance over successive defaults, no matter what length of time had elapsed, this plaintiff in error would stand before this Court in a totally different position.

But they have not done so, and both these propositions are open ones in this Court.

We have shown in the main brief that no Court in New York has considered and decided the precise operation of the Statute of 1877 or of 1892, and we have

also shown that the decisions by the Court of Appeals are entirely consistent with the contention we make, that the operation of the Statute must be limited to the business of collecting premiums within the State of New York.

It is well settled that a decision of a Court is of no weight as an authority except upon points which were not only necessarily involved in the case, but were also considered by the Judges and made the basis of the decision.

In the case of Nickey *vs.* Stearns Rancho Co, 58 Pac. Rep., 459, decided by the Supreme Court of California, an act of the Legislature passed in 1881, was declared unconstitutional, notwithstanding that Court had in a previous case held the law valid and constitutional, and had sustained a judgment based upon it, and the Court, referring to its former decision, said: "It is of no binding force in this action, between differ-"ent parties and upon propositions neither presented "to nor considered by this tribunal in the former "action."

And here we call the attention of this Court to the fact that there is nothing in the New York decisions which bind it, as far as the question here raised is concerned.

In the case of Central R. R. *vs.* Wright, 164 N. Y., 327, it was held that the Georgia case construing a statute will not be regarded by the New York Supreme Court as controlling, when the opinions of the three Judges of the Court agree simply in the result, but no two of them concur in such construction.

So in Carroll *vs.* Carroll's Lessees, 16 How., 275, we have the familiar holding that the construction placed upon a State statute by the highest Court of that State, in a case where the decision did not necessarily involve

the construction of the statute is not binding on this Court.

There is a striking instance of the effect of the Court passing a point *sub silentio* in Cohn *vs.* Goldman, 76 New York, 284. Counsel were claiming that the Court of Appeals had already decided that a similar complaint in another case stated facts sufficient to constitute a cause of action. The Court of Appeals then says of the former case:

"The case was brought to this Court, and the judg-
"ment was here affirmed, but without written opinion.
"The printed points of the appellant presented in a
"short phrase the question of the sufficiency of the
"complaint; but we have no recollection that it was
"pressed upon us in the oral argument. We think
"that it must have passed *sub silentio*, both in the
"argument of the case and the consideration of it by
"this Court. We now feel, after our attention has
"been attracted to it, that we should disincline to hold
"as good, a complaint on such a cause of action, so
"meagre in its averments of the facts."

D.

The limitation of the scope of the Acts of 1876, 1877 and 1892 to the business of collecting premiums demanded to be paid within the State of New York, is consonant with the policy of the legislature manifested by the Act of 1897.

I.

The statute of 1897 beyond question embodies the general idea of a territorial limitation to the business of collecting premiums by foreign and domestic corporations, both controlled alike in this respect, in limiting the duty of the insurance companies to send premium notices to policy holders having post-office addresses within the State of New York. The Legislature by this statute has placed its stamp of approval upon the proposition, that all the protection it desires to give to policy holders of domestic corporations is the same protection and all the protection it can give to policy holders of foreign corporations, to wit, that residents of the State of New York or policy holders having post-office addresses within the State shall be only those who shall be entitled to receive premium notices to avoid a forfeiture of their policies for non-payment of premiums. It is, therefore, reasonable and highly probable that the Legislature by the previous statutes had the intention of limiting the duty of sending premium notices to policy holders who transacted the business of paying premiums within the State of New York. While it would not, of course, be argued that the plain language of these previous statutes was to be overridden by the declaration of a legislative policy in the subsequent Act of 1897; yet, when we find that the previous statutes referred to corporations doing business within the State; when we find that the only business that foreign corporations in connection with the subject-matter of the statute can do within the State is collecting premiums therein; when we find that the Legislature is powerless to affect foreign corporations by these previous statutes except with respect to the business of collecting premiums within the State; when we find no distinction in these previous statutes in their scope and operation with respect

to domestic and foreign corporations ; when we take in connection with all these facts the plain limitation of the Act of 1897, the conviction becomes strong that the Act of 1897 is to be considered as declaratory of the general scope and purpose of these previous statutes, to wit, a territorial limitation of their operation within the borders of the State of New York.

II.

The enactment of an explicit provision on a given subject, does not, of itself, prove that the law on that subject was different before, as such enactment may have been made in affirmance of the existing law and to remove doubts.

The inhabitants of the town of Montville v. *Houghton and another*, 7 Conn., 543.

This was a bill in chancery to obtain the correction of a mistake in a bond executed by the defendants and to compel payment of the amount due on such bond according to the condition thereof.

In decreeing the relief sought and holding a tax legally imposed prior to 1826, DAGGETT, J., speaking for the Court, said at p. 548, stating the doctrine of the case :

"It is still insisted (by the defendants) that as the legis-
"lature in May, 1826 (Stat., Vol. 2, p. 487), enacted that
"towns at their annual meetings, might grant taxes on the
"assessment list, *which should next thereafter be com-*
"*pleted by the assessors;* and also in May, 1828, vested
"ecclesiastical societies with the same power; it is to be
"inferred that taxes could not be laid in this manner
"*before.* It would be unsafe to proceed upon this idea.
"The statute might have been made in affirmance of the

"existing usage and to prevent all objection to it. If "doubts existed, it was proper they should be removed."

Nunnally *v.* White (1861), 3 Metcalfe (Kentucky), 590.

"Our opinion is that such was the rule before (the "revision of the statutory acts). So many previous rules "of law and equity are embodied in the Revised Statutes "that we cannot admit, as contended by appellant's coun- "sel, that the enactment just mentioned raises a presump- "tion that such was not the law before."

Tilford *v.* Ramsey, 43 Missouri, 410.

A statute amendatory of another and giving a right of appeal in certain cases should not be construed as showing that the right did not exist before.

POINT II.

Under the circumstances surrounding the application, issuance, and delivery of this policy in the State of Montana, it was a Montana contract, and under the true doctrine of the conflict of laws, the New York Statutes of 1877 and 1892 were not the law of this contract.

The contract was not a New York contract according to the most recent doctrines of the conflict of laws.

For the argument on this point see Phinney brief, Point III.

In the Rosson case (Appended to the Cohen Brief) the Court in California finds a contract of the Equitable Life issued under precisely similar facts—a California contract—not dominated by the premium notice law.

In the very recent case of South African Breweries *vs.* King. 2 Ch. D. (1899), KEKEWICH, J., quoting Westlake, says: "It may probably be said with truth that "the law by which to determine the intrinsic validity "and effects of a contract will be selected in England "on substantial considerations, the preference being "given to the country with which the transaction has "the most real connection, and not to the law of the "place of contract as such," and then goes on himself to say, "that seems to me as precise and accurate a "statement as one can expect to find in any judgment "or treatise, having regard to the necessarily infinite "variety of facts which require consideration in cases "of this character."

The Court held a contract made in South Africa between an English company and an English employee resident there, which contract was to be performed there, was governed by South African laws.

POINT III.

But if the Court should hold contrary to our contention in Points I and II above that the Statutes of 1877 and 1892 applied to this contract and to the business of collecting premiums outside New York State then it is submitted that the equitable and true construction of the Statute so found applicable is that the Statute operated on the first default alone without notice, and did not preserve the contract forever under successive defaults, and further that forfeiture of premiums already paid is all that was prohibited.

For argument in this point see Phinney Brief, Point IV.

POINT IV.

Should this Court, notwithstanding Points I and II above, hold that the Statutes of 1877 and 1892 governed the business of collecting the Cohen premiums, and that the operation of these statutes was not as contended for in Point III. above then

The premium notice statute, if any, applicable to the Cohen policy after April 8, 1897, was the Statute of 1897, and the policy became lapsed and forfeited on June 9, 1897, one year after June 10, 1896, the date of the last default before the passage of the act.

(*a.*) *The Statute of 1897 was applicable after April 8, 1897.*

(1.) Reason of the Act of 1897.

(2.) The existing judicial construction of the Act of 1897 and the necessity of the Court's settling the construction of the Act.

(3.) General Argument that the Premium Notice Statutes are subject to repeal or amendment as to existing policies.

(4.) Detail comparison, showing conflict between Circuit Court of Appeals in the Sixth Circuit and Hanford, J.

(5.) The question of the applicability of the Statute of 1897 to the Cohen contract is properly before this Court.

(*b.*) *The Cohen policy became lapsed and forfeited on*

June 10, 1897, one year after June 11, 1896, the date of the last default before the passage of the Act.

(1.) This construction is not retrospective.

(2.) Even if our construction is considered retrospective this constitutes no objection to such construction.

(3.) The statute bar of one year in the Act of 1897 is not a State statute of limitations, but a bar connected with the rights given by the statutes of 1876, 1877, 1892 and 1897.

(4.) Such statute bar as this is enforceable in any jurisdiction where the statute right is asserted.

a. THE STATUTE OF 1897 WAS APPLICABLE TO THE COHEN POLICY AFTER APRIL 8, 1897.

I.—Reason of the Act of 1897.

(1.) The first decision of Hanford, J., in the Phinney case was in March, 1895 (67 Fed. Rep., 492).

The affirmance on appeal was in October, 1896 (76 Fed. Rep.. 617).

The Nixon case was affirmed on appeal February, 1896 (44 U. S Appeals, 316).

These cases were, therefore, decided just prior to the meeting of the Legislature in New York in 1897.

The Hill case had also been commenced in October, 1895.

The doctrine of the Ninth Circuit was startling. The effect given to the New York statutes was wholly contrary to the principles of life insurance, namely, the law of mortality, the law of compound interest, the law of reserve accumulations.

To produce the proceeds of policies there must be combined the *payment in advance of premium*, the investment of such premium, or the portion thereof applicable, at compound interest. and this must be done under the law of mortality.

But, under these cases, all the policyholder has to do is to pay his first premium, and then, if the company, in its multiplicity of business, fails to send him a technical notice, in a technical way, abandon his policy to all intents and purposes, but secretly keep it and let the beneficiary take the proceeds, less the premiums which should have been paid.

The Ninth Circuit has violated elementary canons of construction and interpretation, for it is said that interpretation "*should lean strongly to avoid absurd conse-*" *quences, injustice, and even great inconvenience, for* "*the legislative meaning is to be carried out, and it* "*cannot be supposed to be any of these*" (Bishop on the Written Laws, Par. 82).

The Act of 1897 establishes four important propositions as the law of statutory premium notices:

1. *That notices need only be sent where there is a post office address in the State of New York.* (In this brief we have shown this was simply declaratory of the principles of the statutes of 1876, 1877, and 1892.)

2. *That default in paying premium, where notice has not been sent, will keep policy alive only one year, i. e, until next premium is due.*

(This is in accordance with our theory in Point IV Phinney Main Brief, p. 94 that successive defaults were not contemplated by the statutes of 1876, 1877, and 1892.)

3. *That any action to recover where no notice has been sent, or where there is any controversy over time or*

form of notice, or validily of claim for forfeiture, must be brought within one year after default.

4. *That the above propositions should apply to all existing and future policies.*

The statute of 1897 was thus clearly intended to meet the existing situation of "absurd consequences, injus- "tice, and even great inconvenience."

See also Main Phinney Brief, page 9.

Too great stress cannot be laid upon these absurd and unjust results, for it is in their light that the Act of 1897 is to be read. These considerations are in proper cases most pertinent in solving problems of construction, and some of the most extreme instances, like the one at bar, are the following :

In the case of Queen *vs.* Clarence, 22 Q B. D., 65, Lord COLERIDGE, C. J., forcibly says :

> "I confess that the logical deduction from the "words of the statute which has been drawn by my "learned brothers Field and Hawkins, is one "which I find it difficult logically to controvert. "But although it may perhaps not be a good "answer in reasoning, yet in such a matter as the "construction of a statute, if the apparent logical "construction of its language leads to results "which it is impossible to believe that those who "framed or those who passed the statute contem- "plated, and from which one's own judgment "recoils, there is in my opinion good reason for "believing that the construction which leads to "such results cannot be the true construction of "the statute."

See *Ex parte* Corbett, 14 Ch. D., 129.

"I think, also, there is a general rule of construction "of statutes which is applicable to this matter, namely,

"that, unless you are obliged to do so, you must not "suppose that the Legislature intended to do a palpable "injustice."

In the case of *Ex parte* Walton, 17 Ch. D., 750, a question came up as to the proper construction of the Bankruptcy Act, and speaking of it Jessel, M. R., said: "This was the object of the Legislature, and I conceive "that it was their only object; it never could have "been their intention to confiscate the property of any "man without urgent reason for doing so. A construc- "tion of the section which would lead to such a result "might well be, to me the words of Lord Wensleydale, "described as an absurdity. * * * The results of "a literal construction of the section would be so mon- "strous that such a construction must be considered "absurd."

In the same case JAMES, L. J., said: "When the "case was first mentioned to me a fortnight ago, I was "startled at the consequences which would result from "a literal construction of the section."

And he further says that the statute must be understood with a qualification "which is absolutely necessary "to prevent the most grievous injustice and the most "revolting absurdity."

In the cases before this Court we have the individual non-paying policyholder and his speculative representatives on one hand and the great body of premium paying policyholders on the other, for they are the company, and in such case it is proper to take into consideration *in re ambigua* the balance of hardship or inconvenience, and if found against the great body of members to determine any doubtful question of construction in their favor.

This was the principle in Dixon *vs.* Caledonia, 5 Appeal Cases, 827.

In Brockelbank, 23 Q. B. D., 461, the Court also said:

"In this proviso the Legislature have used language "of the widest kind—'in all cases'—so wide that, if "its full grammatical meaning be given to it, the pro- "viso will produce injustice so enormous that the mind "of any reasonable man must revolt from it. * * *

"I cannot think that the Legislature intended this. "Their language will no doubt admit of that construc- "tion, but the consequences would be so startling, that "I shrink from so interpreting it."

United States *vs.* Kirby, 7 Wallace, 486: "All laws "should receive a sensible construction. General "terms should be so limited in their application as not "to lead to injustice, oppression, or an absurd conse- "quence. It will always, therefore, be presumed that "the Legislature intendeds exception to its language, "which would avoid results of this character. The "reason of the law in such cases should prevail over "its letter."

"That construction which will produce a conse- "quence so directly opposite to the whole spirit of our "legislation ought to be avoided, if it can be avoided "without a total disregard of those rules by which "courts of justice must be governed."

Post Master General *vs.* Sorley, 12 Wheat., 146.

In Cohens *vs.* Virginia, 6 Wheaton, MARSHALL, C. J., said:

"The mischievous consequences of the construction "contended for on the part of Virginia, are also en- "titled to great consideration."

And in Sturges *vs.* Crowninshield, 4 Wheaton, 203, the same Chief Justice said: "But if, in any case,

"the plain meaning of a provision, not contradicted by "any other provision in the same instrument, is to be "disregarded, because we believe the framers of that "instrument could not intend what they say, it must "be one in which the absurdity and injustice of apply- "ing the provision to the case, would be so monstrous "that all mankind would, without hesitation, unite in "rejecting the application."

People *vs.* Jaehne, 103 N. Y., 182.

"It is the duty of courts in construing statutes, to "avoid, if possible, a construction which leads to ab- "surdity or manifest injustice, and the case before us "calls for the application of this principle."

(2.) **The existing judicial construction of the Act of 1897 and the necessity of this Court's settling the construction of the Act.**

The doctrines of the Sixth Circuit in the Rosenplaenter case support the above four propositions respecting the Act of 1897. The Rosson decision of the Court in California supports the first proposition.

The Supreme Court of New York in the Schuell case (See Appendix to Cohen Brief) followed the doctrine of the Rosenplaenter case applying the law of 1897 to existing policies, and deciding that the law of 1897 did not give the assured one year after default to make payment, if there had been notice.

In the Hathaway case (Exhibi C) a premium became due in January, 1898, after the passage of the Act of 1897, and Hathaway died over a year after its passage and no suit was begun

until two years after its passage and yet Hanford, J., finds, on what we think unsound reasoning, and in absolute and direct conflict with the Sixth Circuit; that the act of 1897 does not apply, notwithstanding that the acts of 1876, 1877 and 1892 have always been construed to apply the burden of the Act to the companies as to existing policies. HANFORD, J., says of the act of 1897 "there is no express declaration "in the statute making it applicable to policies which "were issued prior to the amendment."

In the Dingley case, against this plaintiff in error, decided in February, 1900, in the Circuit Court of Appeals, and in which case application is to be made in this Court for a writ of certiorari *one* premium was paid in 1892, and none afterwards and suit was not begun until September 31, 1897, and yet the plaintiff was given judgment for $75,000. Truly this is practical spoliation through erroneous construction of statutes, and deprivation of property without due process of law, for the construction of the acts of 1877 and 1892 in the Phinney case and the proposed construction of the act of 1897 in opposition to the Sixth Circuit, the California Court, and the New York Supreme Court amounts practically to such a result.

In the Hathway case the opinion was delivered January 22, 1900, the day the Phinney case was argued in this Court, practically nullifying, so far as the Court could do it, the New York Statute of 1897, and with the result of further legalizing the obtaining of insurance moneys for nothing under the forms of law, thereby taking what belongs to other policyholders who have paid their premiums.

The State Court in Oregon, the California Court, the Supreme Court in New York and the Circuit Court of Appeals in the Sixth Circuit have held the acts

of 1892 and 1897 applicable after their passage to all policies.

The same Court which decided the Phinney case (Hanford, J.), has decided contrariwise, that the acts of 1892 and 1897 do not apply to all policies. This serious conflict, with its attendant confusion of the rights of policyholders, is now before this Court.

3. General argument that the Premium Notice Statutes are subject to repeal or amendment as to existing policies.

(1.)

Failure to give the statutory notice does not operate as a payment of the premium, nor does it relieve the insured from the obligation to make payment of premium. At some time every premium named in the policy must be paid if recovery is had. If the payment is not made when the premium becomes due or by the insured during his life, it must be made when the insurance is collected and all courts have allowed interest on unpaid premiums from their respective due dates. None of the courts have held that failure to give notice liquidated unpaid premiums; none have held that the obligation to pay the premiums was destroyed by failure to give the statutory notice or that the premiums did not become due, even if the notices were not given. The only difference of judicial opinion has been as to when payment or tender of premium should occur in case of recovery, provided the statutory notice had not been given. Technically and logically we think it is admitted by the courts that the premium should be

paid or tendered before action is commenced to recover upon the policy, but because it would in some cases be burdensome and in all comparatively useless to make payment of premiums in advance of the action and recover the whole amount of the policy, when by offsetting the premiums against the policy the same result would be accomplished, it has been held contrary to our view of the settled law applicable to this case that such payment or tender was not required; that the short cut method of equitable application reached the same end.

(2.)

Keeping in mind the fact that payment of premiums is indispensable, whether made before or concurrently with a recovery on the policy, we approach a discussion of the legislation of the state of New York of April, 1897, and of the questions whether it applies to policies antedating its passage, and whether the statute in force at the time the policy was entered into or that in force at the time the premiums become due or remain unpaid, is the one to be applied. If the contract is complete in itself, regardless of the statute, and the general policy of the state is merely expressed through the statute, then we think the legislature is at liberty to alter or repeal the statute in its discretion, and the parties to a contract of insurance are in no condition to complain. The only complaint one insured could make, would be that he was relegated to the duty of performing his contract in the terms he had made it. His express agreement was that he would pay the premiums upon his policy annually or semi-annually, at the beginning of each insurance period, or in case he failed to do so, his contract of insurance should be terminated. His complaint must come outside of the contract in case

of the repeal of the statute, and rest in this fact; that the insurance company was permitted to successfully defend because of his violation of the contract. In all judicial opinions construing the New York statute and its amendments, they are regarded as regulating statutes; as statutes of public policy and merely affecting the remedy. It is not that the courts wish to aid and encourage a dishonest person in a particular instance to cheat an insurance company and obtain insurance he has not paid for — simply because the statutory notice has not been given him (although fully and intelligently informed of every fact the notice could impart), but while having an honest contempt for the dishonest practice in a particular case, nevertheless, giving it the advantage of the statute in order that protection may be afforded a large body of policyholders against their own carelessness, inadvertence and ignorance. In other words, the statute confers no vested right upon any individual policyholder, but extends protection to a large class of insured persons from the consequences, through unmindfulness, of violating their express contracts. If experience should satisfy the Legislature that such a statute does not promote the end designed, or that it is unwise or inexpedient, that body is at liberty to alter or abandon its policy. The insured or his beneficiary has no ground of complaint of the legislative action for the obvious reason that the repeal of the statute leaves the obligation of his contract untouched. In fact, the repeal of the statute validates and reaffirms the contract in the language and stipulations of the parties to it. The repeal of the statute affects only the policy of the state; so far as the parties to a particular policy of insurance are concerned, its effect is simply to open the doors of the courts to the insurance company to defend

against recovery on a violated policy upon the ground of breach on the part of the insured, which before, without giving the statutory notice, it was not permitted to do.

(3.)

If the foregoing propositions are correct, namely, that the failure to give the notice does not pay or discharge the premiums or impair the obligation for their payment; and the statute prescribing notice is one of state policy and regulaion—subject to amendment or repeal at any time—then we think it follows that the statute in force at the time the premium falls due or remains unpaid, controls. The insured cannot control the discretion of the legislature in altering or repealing a statute expressive of its views of policy, and therefore holds his policy with the understanding that such a statute is liable to amendment or repeal at the legislative pleasure. If the amendment or repeal takes effect before a particular premium falls due, the insured must see to it that he makes payment of that premium as he has agreed to do, or suffer the agreed consequences of his breach of contract. If he is in arrears in payment of other premiums when the law is amended, repealed, he must likewise know that unless he makes payment of such defaulted premiums the same consequences follow.

Such is the reasoning and conclusion in the case of Rosenplanter *vs.* Provident Savings Life Assurance Society in the 91st Fed., 728, and as adopted and approved in the same case in the Circuit Court of Appeals, 96 Fed., 722. The facts in that case were fully set forth in the complaint, and their sufficiency tested by demurrer, the Court adopting the view that the policy was a New York contract and specifically provided that "at

all times and places" it shall be construed to be a contract made in the city of New York. It was averred the policy was executed and delivered April 1st, 1889, when the statute of New York of 1877 was in force. The Court assumes this contract was within the meaning and under the protection of chapter three hundred and twenty-one of the laws of New York of 1877. The declaration avers the semi-annual premium of April 1st, 1889, was paid, as were also those of October 1, 1889, April 1, 1890, October 1, 1890 and April 1, 1891, but the insured did not pay the semi-annual premiums falling due October 1, 1891, April 1, 1892, October 1, 1892, April 1, 1893, October 1, 1893, nor April 1, 1894; and that the insured died September 5, 1894, leaving the six semi-annual premiums due and unpaid. The averment as to notice showed that the statute of New York had not been complied with and hence the notice was of no effect. If the statute of 1877 remained in force, the notice was indispensable. But if the act of 1877 had been repealed by the act of May, 1892, it was held no notice was required because the policy being for the term of one year was excluded from the application of the statute of 1892, though embraced within the provisions of the act of 1877. It is thus seen that under the act of 1877, in existence when the contract of insurance was entered into, the policy could only be terminated by giving the statutory notice whereas under the act of May, 1892, notice had been entirely dispensed with. The vital question in the case then was: Was the legislature without the power to repeal the statute requiring notice, and leave the insured and his beneficiary to the consequences of a violation? Judge HAMMOND in meeting this contention in the Circuit Court says:

"I cannot assent to this. If the provisions of

the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them, wherefore it would be enforced by the courts as the agreement of the parties. But the statute did not undertake to make a contract of insurance for the parties. It was only a statuto·y regulation for the government of insurance companies, compelling them to give notice as required by the act, of the non payment of premiums, before they would be allowed to declare a policy forfeited, according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel; that is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract, by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but, if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary."

The Circuit Court of Appeals adopts this reasoning and this language in meeting and overcoming the same contention, and supplements the reasoning as follows:

"The contract which the parties themselves made was one for an insurance for a single year,

with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy, without more ado. So with respect to the payment of the second half of the yearly premium. If not paid when due, the contract was thereby terminated. The act of 1877 interposed, and for the benefit of the insured provided that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in, and in effect said: 'You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums, unless you first comply with this statute by giving the notice herein required.' The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties have entered to be enforced according to its own terms and conditions."

The Circuit Court of Appeals, in its opinion, cites Ins. Co. *vs.* Cushman, and this last case is cited in City *vs.* New Orleans, 157 U. S., 224, where Mr. Justice HARLAN says:

"One who engages by contract to do a certain "thing, cannot claim that the obligation he has "assumed is impaired by legislation that is de-

"signed only to enforce performance of his obli-
"gation."

If the companies cannot complain of the burden, the policy holder cannot complain of its modification.

In Campbell *vs.* Holt, 115 U. S., 627, the principle is stated:

"In all this class of cases the ground taken is that
" there exists a contract, but, by reason of no remedy
" having been provided for its enforcement, or the rem-
" edy ordinarily applicable to that class having, for rea-
" sons of public policy been forbidden or withheld, the
" legislature by providing a remedy where none exists, or
" removing the statutory obstruction to the use of the
" remedy, enables the party to enforce the contract, other-
" wise unobjectionable."

The legislation of 1897 removes the statutory obstruction to the forfeiture.

The same principle is found in Smoot *vs.* Building Co., 95 Va., 686.

"If a corporation may be denied the right to plead usury as to existing contracts, is it a greater stretch of authority upon the part of the legislature to create a corporation to which individuals may by their voluntary contracts bind themselves to pay more than the rate of interest allowed by law? In the one case the legislature was held to have the power to deprive corporations of a right conferred by existing law; in the other case the power of the legislature is invoked to remove a disability to contract which it had imposed.

Statutes which validate contracts, otherwise invalid, are sustained when 'they go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some

legal formality, *or in consequence of someingredient in the contract forbidden by law.*'

Cooley on Con. Lim., 6 Ed., p. 460."

It is thus demonstrated by these opinions that the legislature may entirely repeal the statute in force at the making of the contract and throw the parties back upon the terms of that contract without the violation of any vested right, and had done so by dispensing with the notice which was required when the contract of insurance was entered into. If it was within the legislative competency to take away from a policy holder all the protection of the act of 1877 by that of 1892, it was and is equally within its authority to remove, alter, modify or limit the protection afforded by the statute of 1892, which was done by the act of April 8th, 1897. The act of 1892 was obliterated and merged in that of 1897, just as that of 1877 had been in the Act of 1892. A cause of action or defense given by a statute founded on grounds of public policy conferred no vested right which could not taken away by a similar statute, and a repeal of a law which gave such right of action or defense, terminated all claim to such recovery or defense, although the contract was made previously.

Washburn *vs.* Franklin, 35 Barbour, 599.

The act of 1897 provides

> "No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

In the case of Caroline L. Hathaway and Horace C.

Hathaway *vs.* The Mutual Life Insurance Company, decided January 22nd, 1900, in the Circuit Court for the District of Washington, Judge Hanford finds that the policy of insurance upon the life of Homer M. Hathaway was delivered and the first premium paid January 26th, 1892 ; that annual premiums were to be paid January 26th in each succeeding year during the continuance of the policy ; that the premium falling due January 26th, 1893, and each succeeding year to the death of the insured, were not paid ; that Hathaway died April 15th, 1898 ; that the action to recover upon the policy was not instituted until the 5th of April, 1899. He stated in the opinion that when the contract of insurance was made the statute of New York of 1877 was in force, and that the policy in its inception was under the protection of this statute. He finds as a fact in the case that by the express terms of the contract no notice was required to be given as to the due date of premiums other than the contract itself recited of when they fell due and an express waiver of any further notice whether required by statute or otherwise than as contained in the policy. Judge HANFORD states :

> " It is my opinion that the rights of the parties under the policy of insurance in suit were not affected or changed by the new legislation of 1892. Conceding that the statute of 1877 prescribing the notice to be given was repealed, still there was no interval of time intervening after the repeal of that law, and before the substituted section became effective within which the insurance corporation claimed a forfeiture of the policy for non-payment. The policy cannot be forfeited for non-payment of premium until thirty days after the mailing of the prescribed notice. In the year 1897 the law was again amended and section ninety-two of the law of 1892 which saves life insurance policies from

forfeiture for non-payment of premiums unless the prescribed notice shall have been given, was re-enacted, but with such a change of phraseology as to change the effect so as to only save policies from forfeiture for a period of one year after a premium has been due and unpaid, and with an additional provision barring actions on policies after the lapse of one year from the date of the payment of any premium."

In meeting the reasoning of the Rosenplanter cases, Judge HANFORD says the questions involved in the Hathaway case and the other cases enumerated, determined in the Ninth Judicial Circuit, are entirely different from the main question decided in the Rosenplanter case, and gives his concurrence to the opinions in the latter case as follows:

"I feel entirely free to concur in the opinions in the latter case and I assent to the general proposition that existing rights which do not rest upon agreements of the parties nor upon any consideration of value received, but only hang upon arbitrary provisions of paternal statutes, may be cut off at any time by act of the legislature which created them without impairing the obligations of contracts, but to cut off existing rights the act must contain explicit declarations of its purpose to cut them off or its provisions must necessarily cut them, as would be the case where the statute upon which they depend is repealed, without a saving clause. The courts will not presume that a new statute was intended to cut off any existing right when there is no express declaration of such intention, for the reason that it is contrary to the policy of our government to construe statutes so as to make them operate retro-actively. In the Rosenplanter case the policy under consideration was a term policy and expired by its own limitations, unless it was renewed by the omission of the Insurance Co. to proceed according to the provis-

ions of the act of 1877, to effect its forfeiture. It was not kept alive by the statute of 1892, because it belonged to the exempted class, and it was not protected by the Act of 1877, after the repeal of that act."

We respectfully submit that Judge Hanford draws a mistaken conclusion from the premises he assumes. He concurs in the reasoning of the Judges in the Rosenplanter case and allows his difference in conclusion from those cases to depend too much upon the accidental fact of the insurance being for a shorter term in the one case than in the other. Now, it being admitted that the one year term is under the protection of the act of 1877 as well as policies for longer terms, then no right of repeal of the statute can be found in the one instance that does not equally apply to the other. In the Rosenplanter case the power of the legislature is not measured by the term of the policy, but by the ample and complete legislative authority to repeal the statute relating to notice as applied to all policies. This reasoning, Judge Hanford concedes to be sound, and the power of the Legislature is admitted, to take away all protection. The infirmity, we think, in Judge Hanford's reasoning, is in unconsciously carrying the idea of vested rights in the provisions of a regulating statute and allowing what seems the smallness of a one year policy to afford ground for one construction of the statute, which would not be justified in applying the same statute to a policy of longer term. He states that, by its own limitation, the contract in the Rosenplanter case would expire before the protection of the statute, which is equally true of the case he is passing upon. Unless the premium is paid by Hathaway on the 22nd day of January after the delivery of the policy and each succeeding January thereafter, by its own express terms,

that policy falls. The Rosenplanter policy is one antedating the statute of 1892, just as is the Hathaway policy. Judge Hanford says of the Rosenplanter policy, it was not kept alive by the statute of 1892, because it belonged to the excepted class, and it was not protected by the act of 1877 after the repeal of that act.

If Judge Hanford is in error as to the statutes of 1892 and 1897 having no bearing on policies in existence prior to their passage, then we would adopt the conclusion of the judges in the Rosenplanter cases. Those judges found the statutes applied to all policies, those in existence as well as those afterwards to be entered into.

The following are the structural and declaratory parts of Section 92 of the Act of 1897:

> "No life insurance corporation doing business in this state shall within one year after the default of payment of any premium *declare forfeited or lapsed* any policy hereafter issued or renewed. * * * * *Nor* shall any such policy be *forfeited or lapsed* by reason of non-payment when due of any premium * * * within one year from the failure to pay such premium * * * unless a written or printed notice * * * shall have been duly addressed and mailed to the person whose life is insured. * * * If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken *to be a full compliance* with the requirements of the policy in respect to the time of such payment * * * no action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the date upon which default was made in paying the premium * * * for which it is claimed that forfeiture ensued."

There are two grounds for bringing the Cohen policy within the operation of the Act of 1897.

The *first* is that as the policy was issued in 1885, it is covered by the words "hereafter issued or renewed" in the Act of 1897, which relate back to the Act of 1876, where they first appear in this continuous body of premium notice statutes.

This is in accordance with the well-settled principle of Ely *vs.* Houlton, 15 New York, 595, where it was held that the effect of an amendment to a statute, made by enacting that the statute, "is amended so as to read as follows," and then incorporating the changes and additions, with so much of the former statute as is retained, is not that the portions of the amended statute which are merely copied without change are to be considered as having been repealed and again re-enacted, but that the new provisions, or the changed portions, should have been deemed to have been the law at any time prior to the passage of the amended act. The part which remains unchanged is to be considered as having been continuously the law from the time of its original enactment, and the new or changed portion to have become law only at and subsequent to the passage of the amendment. This was applied in Matter of Warde, 154 New York, 342.

In this case the words "has already begun" in an amendment did not have the effect of making the words refer to the date when amendment took effect, but left them continuing to speak as of the date when they originally went into effect.

So in Stevenson *vs.* Brewing Co. *vs.* Eastern Co., 22 App. Div., 523, where a statue of 1833 provided for refiling a chattel mortgage saying: "Every mortgage *filed in pursuance of this act, etc.*" This was amended in 1895 by requiring a change in the statement, and the Court said: "It is insisted by the learned counsel for the plaintiff

that the statute as thus amended is applicable only to mortgages subsequently made. It is true that an amendatory statute does not have an retroactive effect, when it appears that such was the legislative intent.

* * * * * * *

"The application of that principle in the present case does not exclude from the effect of the amended statute that which is required to be done subsequently to continue the validity of the mortgage as against the creditors of the mortgagees. Said application is prospective. It may, in a case like that in question, be unfortunate to have an act take effect so recently that a party may not be advised of its provisions, what he is legally required to observe, and for failure to do so is subjected to prejudicial consequences."

The Cohen policy was "hereafter" issued, that is after the act of 1877 so that under this doctrine there is no question of the applicability of the act of 1897.

The *second* consideration involves the meaning of the word "renewed" read in the light of the existing situation.

It is apparent that this statute applies mainly and at all events to two kinds of policies, namely: a first kind, policies "hereafter issued," that is, to future contracts of insurance. But the legislature did not stop here irrespective of the principle stated above. The policy of the law and the import of its provisions were required for the protection of those who held policies at the time of its enactment, as well as those who might thereafter have policies issued to them. So the legislature provides for a second kind of policies, and policies which had been issued prior to the enactment of this statute, but which would be "renewed" afterwards. It must be conceded the legislature could not provide protection to policies which had gone out of existence—had become void and ended—

because that would be beyond legislative power. If the policy had ceased to be a contract then only the parties could readopt it, or, more correctly speaking, they alone could make a new contract by their mutual consent, recreating and continuing the old contract as their new contract. If the contract had gone out of existence, it would be a solecism to say the legislature could bring it into being again. It could no more do so than it could make any other contract for the parties. Now the legislature must be conceded to be dealing with something else than a dead contract when it regulates the conduct of parties toward each other in a contract to be "renewed." It therefore, in making regulations for policies "hereafter renewed," is dealing with contracts in existence—in life ; that is, its regulations must pertain to such policies as are contracts. To renew an existing contract is to feed it, to continue it, to refresh, to reinforce, to strengthen it. It is not to perform the legislative miracle of raising a dead contract from the grave. So that on the one side the policy "hereafter renewed" is not one to be issued in the future, because that has already been provided for ; and on the other hand, it is not to bring back from the realm of dead contracts the contract which has ceased its existence. Hence the legislature must have had in contemplation such policies as are yet alive, but liable, for lack of some protection or performance or observance by the parties, to become terminated ; and by this course of reasoning we are forced to that class of contracts that may be continued by performance of condition on the one side, or expire or terminate from lack of such performance, and that is the policy where the holder or beneficiary pays his stated premium and has the insurance up to a given time with the privilege of paying the second installment of premium and renewing his contract from premium

period to premium period until the end of the insurance term is reached. In other words, the policy or policies "hereafter renewed" are the policies in existence at the time the law was passed, and were to be kept alive by the performance of the express condition of the policy in paying the periodic premiums. This interpretation makes the law harmonious and attributes to the legislature the wisdom of applying the general policy it has adopted to all persons similarly situated, and not selecting one portion for its protection or favor and leaving the other without such protection or care. We think this section demonstrates that such is the meaning of the legislature, because it provides that if the prescribed notice is timely given and the policy holder comes in "Within the time limited therefor" and makes payment, such payment shall be taken to be a compliance with the requirements of the policy. In other words, the policy, if payment is made within the prescribed time, is "renewed." It holds it in life until thirty days after notice of the due date of the premium and provides that payment within that time shall operate as a compliance with the contract, or as a renewal of the contract, and continue it in being for another premium period. This is the interpretation placed upon this term from its use in the original act by the courts of the state of New York. It was made very clear when brought to the attention of the Court of Appeals of New York in the early case of *Carter* v. *Brooklyn Life Ins. Co.*, 110 N. Y., 15 (17 N. E., 396). That Court says, in construing this expression:

> "We are also of the opinion that the payment of each annual premuim constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly

provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract or the creation of a new existence. Webst. Dict.; Worces. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

The act of 1897 thus clearly applied to a policy like that of Cohen and Hathaway. Taking it that policies of this character are within the law, has the

statute been observed so as to entitle a recovery? The statute very clearly declares that the policy shall not be forfeited or lapsed; that is, it shall not be terminated, *within one year* from the due date of a premium on account of failure to pay the premium, unless the notice is given. Of course if the notice is given and the premium is not paid the policy terminates at the expiration of thirty days from the notice of the due date of the premium, but if it is not paid and the notice is not given, then it does not terminate through failure to pay *within one year* from the date when the installment or premium became due; but if the year *goes by* and no such payment is made, then the policy does terminate and the express stipulations of the parties that it shall terminate, are left unhampered by legislative restriction, and that period of time elapsing without payment makes a termination and ending of the contract by the express agreement of the parties to it.

Opposing counsel have attempted to give an unwarranted effect to the clause in the application that it is made subject to the charter of the Company and the laws of the State of New York. Even if this clause could operate to make the New York statute applicable as it might exist at the time, the contract would be subject to the statute as it might be amended from time to time. There is in this application no agreement that any specific statute shall be a part of the contract. It is simply made subject generally to the statute. The policy-holder must pay year by year and each year the statute then in force controls. We have already claimed in our main brief, at page 70, that the company in any event can only be considered to have contracted to send notice if the law requires it; if not required, then the company does not contract to send it.

The application is made subject to the charter. It certainly could not be claimed that the provisions of the charter which existed at the time of the Phinney policy could not be amended or modified in any way during the life of that contract. The clause simply meant that the application was made in harmony with and not in contradiction of, and subject to whatever might be the charter of the company and the statutes of the State, whether then existing or as amended from time to time, for the Legislature of the State of New York has always had full power to amend the charter of the company and the act of 1877.

It was not meant that the policy holder and the company contracted that the laws of New York then in existence should always govern the contract irrespective of whether those laws were amended or repealed. The parties could not oust in this way the jurisdiction of the Legislature of the State of New York over the contracts of the company. Such was not plainly the intent of the parties. The intent of the parties was simply to declare that in dealing with each other they dealt subject to the laws of New York as they might then exist or from time to time be amended or repealed.

In the Rowe case (42 N. Y. Supplt., 646) the policy was issued in 1863 and the Court said, "Inasmuch as "this policy was renewed after the passage of that "statute (1876 as amended by the statute of 1877) it ap- "plies to the policy in suit" and refers to the Carter case. The law of 1877 was applied to this contract and not the law of 1876. It cannot be claimed that the payment of at least one premium after the passage of the act of 1876 is necessary to bring a policy within the operation of the statute. The payment of the premium is a voluntary act on the part of the policy holder with which the Company has nothing to do. It cannot be

that whether the burden of notice can be thrown upon the Company depends upon the will of the policy holder. That would not relieve the statute from the objection that it impaired a contract as against the Company. It is too narrow a view of the word "renewed" which must mean "to be renewed," that is, the statute applies to all policies thereafter issued, and to all premiums due and payable thereafter on existing policies which are "to be renewed."

Thus in Head *vs.* University, 19 Wallace, 530, the plaintiff was elected a professor to hold his office "subject to law," and this Court said "when it was, "at the same time, declared that this position should "be held by him for six years, 'subject to law,' it "cannot be doubted that he understood it to be a part "of the contract that the legislature could, at their "discretion and in their pleasure bring it to an earlier "end," and

"The plaintiff accepted his office subject to the laws "then in existence, and subject to the passage of "such subsequent laws as should seem wise to the "legislature."

No Court has ever held to the contrary of the above. The proposition that the law in existence at the time the contract was issued controls such contract forever is a proposition for which there is no support in any of the premium notice cases and it is based upon a misuse by counsel of the language in some of these cases. For instances, the language in De Frece *vs.* Insurance Co., 136 N. Y., 144, where the Court says: 'The contract is to be read as if the act of 1876 had been literally incorporated into it" When the New York Court of Appeals made this statement and other similar statements it did not have before it any question whatever of the effect of an amendment of the statute.

In fact, in some of those cases the rule we contend for is hinted at even when no such question was before the Court. Thus in the Baxter case, 219 N. Y., 450, the Court says:

> "The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in Chapter 341 of the Laws of 1876, as amended by Chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

This is nothing more than saying that so long as the statute is in existence it controls the policy. The same idea is found in the Griesemen case (10 Washington).

In the same way in the Pollard case (26 Southeastern, p, 422), quoted by opposing counsel, the Court says:

> "It (the statute) is therefore as much a part of every contract of life insurance governed by the laws of the State of Ohio and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws," &c.

It may very well be that in the case of a New York policy the premium notice statute controls the provision of such policy, but it would control it whether there was any clause in the application or policy or not. We have already contended that the clause in the application in the Phinney policy did not in any way make the

Phinney policy subject to the premium notice law of New York, because that premium notice law did not apply outside of the State of New York, and the statute is to be read just as if it so expressly stated. It could not be claimed that the clause in the application was intended to make a New York statute applicable to the Phinney contract which on its face did not apply, but was only intended to make the charter of the company and such statutes of New York as were applicable govern the policy. No argument, therefore, can be drawn from the clause in the application and the language in the cases referred to that the Acts of 1877 and 1892 could not be amended or repealed as to existing policies.

(4.) Detail comparison showing conflict between Circuit Court of Appeals in the Sixth Circuit and Hanford, J.

There have been four decisions directly involving the question under consideration:

(1.) The case of Rosenplanter *v.* Provident Life, 92 Fed. Rep. 728, opinion by Hammond, J., affirmed 96 Fed. Rep., 721, opinion by Lurton, J., concurred in by Black and Thompson, JJ., decided that the act of 1892, and not the act of 1877, governed the premium notices after October 1, 1892, on a policy issued in 1888.

In the Rosenplanter case (see opinions annexed hereto as Exhibits A and B. The Court is referred to these opinions for full arguments upon the applicability of the Actof 1892 after Oct. 1, 1892) the policy was issued April 1, 1889, at which time the statute of 1877 was in force. *The Court held that the policy was at the time of its issue within the meaning and protection* of the statute of 1877.

Premiums were paid in 1890, and in 1891 up to April 1 1891, but not paid thereafter, or in 1892, 1893, or 1894, and the insured died September 5, 1894.

After reviewing the act of 1877, the Court says:

"But for the *subsequent act of May 18, 1892*, there "would be no serious doubt that this policy was in force "at the date of death of the insured, no effectual "statutory notice having been given."

The statute of 1892 excepts from its operation any policy which is "a term insurance contract for one year or less," and such exception did not exist in the statute of 1877.

The Court then proceeds to hold that the Rosenplanter contract was a term insurance contract for one year or less, and that after 1892 no notice had to be sent, although previously required, as to this statute of 1877.

The Court will observe from this statement, and from the opinion of Judge Hammond (Exhibit C), that the doctrine of the Rosenplanter case is that under the statute the failure to send a notice *does not relieve the insured from the contract obligation to pay future premiums, but* the statutory requirement as to notice and the effect of the notice statute upon the rights and liabilities of both parties depends upon what that statute is at the time each premium becomes due. In all these premium notice cases the *premiums due up to the date of death are deducted* (see Exhibit C, *ad fin.*). This can only be on the theory that failure to send a notice one year does not relieve the insured from future premiums.

In the Rosenplanter case no semi-annual premium was paid in October, 1891, nor April, 1892, nor in October, 1892, and at these dates the statute of 1877 required notice, so that, while the policy had not lapsed in October, 1892, the insured being still alive, there was the obli-

gation to continue to pay. On October 1, 1892, the act of 1892 went into effect, which act the Court holds then excepted the Rosenplanter contract from its provisions. There was a default in 1891, the contract was not forfeited, the law of 1877 was repealed, a saving clause was enacted, but the law of 1892 went into operation. Rosenplanter's contract was in existence in April, 1893, his premium then became due, he was not relieved from the obligation to pay it, *and the statue then in force did not require a notice and none was sent, so that this* default operated to lapse the policy.

Such is the decision in the Rosenplanter case.

Judge HANFORD, in the Hathaway case, says: "I feel "entirely free to concur in the opinions in the latter "(Rosenplanter) case," and then proceeds, after this keeping word of promise to the ear, to break it to the hope by deciding diametrically opposite to the Circuit Court of Appeals in the Sixth Circuit in the Rosenplanter case.

We will now demonstrate such conflict. In the Hathaway case (see Exhibit C) the policy was issued January 26, 1892, when the act of 1877 was in force.

The act of 1877 therefore governed this contract, and, according to the doctrines of Mr. Warburton, would always have governed it, and HANFORD, J., says: "It is "my opinion that the rights of the parties under the pol- "icy of insurance in suit *were not affected or changed by* "*the new legislation of 1892.*"

And yet HANFORD, J., says shortly after: "The sole "question to be decided in the case is whether the amend- "ment of the law of 1892 by the act of 1897 had the effect "to terminate the contract between the parties imme- "diately and to bar an action upon the policy after the "death of the insured, which occurned subsequent to the "date of said statute."

Hanford, J., while apparently holding that the act of

1877 first applied, and then the act of 1892, denies that the act of 1897 ever applied.

Let us apply now the doctrine of the Rosenplanter case to the facts in the Hathaway case.

The Act of 1877 was in force when the Hathaway contract was issued in January, 1892.

No premium became due until January, 1893, when the act of 1892 was in force, and at that time, under the Rosenplanter case, notice had to be sent, because the contract was under the act of 1892. It was not, like the Rosenplanter contract, excepted from the act of 1892; no notice was sent, but Hathaway was not relieved thereby from his obligation to pay in January, 1894. The same held good in January, 1895, January, 1896, and January, 1897. And on April 8, 1897, when there was an existing default, the statute of 1897 was passed, declaring, as HANFORD, J., says: "The act of 1877 permits "life insurance companies doing business in the "State of New York to forfeit their policies "for non-payment of premiums, *and without giving the "printed notice*, but only after the lapse of one year from "the date on which the unpaid premiums became due "and payable, and bars an action upon a forfeited policy "unless it be commenced within one year from the date "of default in the payment of the premium for which the "forfeiture is claimed." In 1894, 1895, 1896, and January, 1897, the act of 1892 applied under the Rosenplanter case.

This statute of 1897 immediately applied to the existing contract (as the statute of 1892 did to the Rosenplanter contract), and all rights under the contract were barred, either April 8, 1898, one year from the passage of the act, or January 26, 1899, one year from the first default subsequent to the act. The action was commenced in April, 1899. Hathaway died April 15, 1898. He himself had

up to April 15, 1898, and his executors or wife and son up to January 26, 1899, at the latest to enforce the contract.

There is one other feature of the Hathaway case. Under the act of 1897, notices are expressly limited to post office addresses within the State of New York (declaratory, as we contend, of the existing law). *So that on January 26, 1898, no notice whatever was under any theory of these statutes required to be sent to Hathaway.*

The act of 1892 was applied on its passage to a pre-existing policy in the Rosenplanter case.

But under Judge Hanford's ruling the act of 1897, can never apply to a pre-existing policy.

The opinions are thus diametrically opposed. There was no express declaration in the act of 1892, making it applicable to pre-existing policies in the sense meant by HANFORD, J. Under the act of 1877 notice was necessary in the Rosenplanter case, the Court says: *And it was not sent.* It was not sent in 1891, or 1892, or 1893, or 1894. But it was held not necessary in 1892, 1893, and 1894. Why? Because the statute of 1892 applied to the pre-existing policy, and declared it after 1892 not controlled by the act.

There was just as much an existing right in Rosenplanter, under the Act of 1877, as there was said to be in Hathway under the Act of 1877, or 1892.

"HANFORD, J., says: "In the Rosenplanter case the "policy under consideration was a term policy, and ex-"pired by its own limitations, unless it was renewed by "the omission of the Insurance Company to proceed ac-"cording to the provisions of the Act of 1877 to effect its "forfeiture."

Not at all. It expired unless the premises was paid, as does every policy; or unless it was renewed by the failure to send notice, and the Court held it was so re-

newed in 1892, and October, 1892, but not in 1893 and 1894. It was, as the Court said, within the meaning and protection of the Act of 1877, but not 1892, as it was expressly excepted.

(2.) The case of Hathaway *v.* New York Life, in the Circuit Court of the State of Oregon for Multonomah County, decided in the case of a policy issued in 1891, and on which no premiums were paid in May, 1892, 1893, 1894, 1895, 1896, and 1897, the insured dying April 15, 1899, that the action was not brought within one year from the date upon which default was made in paying the premium due upon such policy, for the non-payment of which it was claimed that the forfeiture ensued, and that therefore the claim was barred. This was the same life insurance as in the case decided by Hanford, J.

(3.) The case of Schuell *v.* Mutual Life Ins. Co. of N. Y. was recently decided in the Supreme Court of New York, and it was held that after April, 1897, the act of 1897, and not the act of 1892, governed a policy issued in 1896.

See copy decision annexed hereto.

(4.) The case of Hathaway *v.* Mutual Life, (discussed above).

5. The question of the applicability of the Statute of 1897 to the Cohen contract is properly before this Court.

Mr. Warburton, in his supplemental brief, on pages 16, 17 and 18, claims *first* that the statute of 1897 is not before this Court in the Sears and Cohen cases because the assignment of errors do not especially refer to it, and

second, that even if before this Court, it has no bearing on the Cohen and Sears cases. His claims are based upon an entire misconception of the record and of the function of an assignment of error in these cases and of the nature of the statute of 1897. As this matter is discussed in this brief rather than in the Sears brief we will first briefly state record in both cases.

The record in the Sears case shows as follows:

The suit was begun September 28, 1898 (Rec., 1), eighteen months after April 5, 1897, when the act was passed, and six months after Sear's death on March 30, 1898, *two* premium due dates having occurred after April 5, 1897, namely, May 18, 1897, and May 18, 1898.

The answer was demurred to on the ground that it did not state facts sufficient to constitute a defense to the complaint (Record, 20). The demurrer was sustained (Record, 22) and the assignment of errors, and specified that the Court erred in sustaining the demurrer, and further that the Court erred in granting judgment for the plaintiff "because it is manifest upon the issues formed "in said cause that said plaintiff and defendant in error "was not entitled to judgment (Record, 25)."

The case was affirmed by the Ninth Circuit upon the express ground that under the New York premium notice statutes (not expressly referred to in the pleadings) the plaintiff could recover.

The record in this Cohen case shows as follows:

The suit was begun November 9, 1898 (Rec., 1, 10), nineteen months after April 5, 1897, when the act was passed, and almost fourteen months after Cohen's death, on September 21, 1897, *one* premium due, date having occurred after April 5, 1897, namely June 10, 1897.

The answer was demurred to on the ground that it did not state facts sufficient to constitute a defence to the com-

plaint (Rec., 20). The demurrer was sustained, and the assignment of errors specified that the Court erred in sustaining the demurrer, and further that the Court erred in granting judgment for the plaintiff, "because it is mani- "fest upon the issues found in said cause that said "plaintiff and defendant in error was not entitled to "judgment" (Rec., p. 33). The case was affirmed by the Ninth Circuit upon the express ground that under the New York premium notice statutes (not expressly referred to in the pleadings) the plaintiff could recover (Rec., p. 52).

See opinions in these four cases, *which were all on demurrer.*

Mutual Life *v.* Hill, 97 Fed., Rep., 263.
Mutual Life *v.* Allen, 97 Fed., Rep., 985.
Mutual Life *v.* Cohen, 97 Fed., Rep. 985.
Mutual Life *v.* Sears, 97 Fed., Rep., 986.

The Court is also refered to the records in the Sears, Cohen, Hill and Allen cases.

As the Circuit Court of Appeals for the Ninth Circuit said in the Hill case (Hill Rec. p. 63): "There was no "necessity for the defendant in error (*i. e.* the plaintiff "Hill) to plead the Statute of New York. The United "States Courts take judicial notice of all the Public "Statutes of the several states." And in Mills *v.* Green, 159 U S. 657, the Court says: "The lower Courts of the "United States, and this Court on appeal from their de- "cisions, take judicial notice of the constitution and pub- "lic laws of each State of the Union."

The Court takes judicial notice of the statutes of New York, and a fact *judicially noticed* is read into a pleading. (Abb. on Pleading, Sec. 55.)

This Court considers only errors assigned, and the same rule applies to the Circuit Court of Appeals.

An assignment of error is sufficient if it states distinctly

just what action, of the Court below is alleged to have been erroneous.

A statement of *reasons* why the Court should have decided otherwise "constitute a good brief, but in the *assignment of error are irrelevant.*"

Atchison *v.* Meyers, 76 Fed., Rep., 443.

Where final judgment has been entered on demurrer and writ of error is taken no bill of exceptions is necessary.

In Rogers *v.* Burlington, 3 Wallace, 661, defendant demurred, Court sustained demurrer and rendered judgment for defendant. And this Court said: "It is well settled "that the ruling of the Circuit Court in sustaining or "overruling a demurrer to a declaration and rendering "judgment for the wrong party may be re-examined in "this Court by a writ of error without any formal bill of "exceptions."

See also

Suydam *v.* Williamson, 20 Hun, 436.
Aurora City *v.* West, 7 Wall., 91.
Gould *v.* Granville, 91 U. S., 527.

The assignment of errors in this case was in accordance with Rule 11 of the rules of the United States Circuit Court of Appeals, which Rule 11 is similar to Rule 21 of the Supreme Court of the United States. This Rule 11 provides that the plaintiff in error shall file with the clerk, with his petition or writ of error, an assignment of errors which shall state separately and particularly each error desired and intended to be alleged, and that when this is not done counsel will not be heard except at the request of the Court, and if the error has not been assigned according to this rule it will be disregarded, but the Court, at its option, may notice a plain error not assigned.

The assignment of errors and the provisions of Rules 11 and 21, above referred to, and the petition and the writ of certiorari in this case amply justify the presentation of the Act of 1897 to this Court.

In the Sears case the statute of 1892 was not expressly referred to in the pleadings, but the Court took judicial notice of the act of 1892, and held that, as no notice was alleged to have been sent, the act of 1892 prevented a forfeiture. The facts set up in the answer were admitted, and by the answer it appears that no premiums were paid after May, 1892. On referring to the complaint it appears that no suit was begun until September, 1898 (Rec., 3). If, therefore the Court takes judicial notice, and reads into the pleadings the act of 1892, and claims the policy was not forfeited because a notice was not sent, the defendant is equally entitled to have the amending act of 1897 read into the pleadings, andurges the proposition upon the pleadings that no suit was begun within a year from the last default which was May 18, 1897.

In the Cohen case the policy was issued June 10, 1885. Default was made from December, 1892, to June, 1897, subsequent to the passage of the Act of 1897, and Cohen died September 21, 1897. Suit was begun in November, 1898.

In the Allen case the policy was issued February, 1893, and the first default was February 10, 1894, and continued until July 9, 1897, when the insured died, and on December 28, 1897, the suit was begun.

In the Hill case the policy was issued in 1886, and Hill died in December, 1890. But the act of 1897 is not involved in the Hill case.

It is familiar learning that on demurrer judgment is to be taken against the party committing the first default.

Gorman *v.* Lenox's Executor, 15 Peters, 115.
Morton *v.* Kirk, 79 Fed. Rep., 291.

Upon demurrer to answer the judgment of the Court is invoked upon the law of the case as presented by the pleadings.

Baxter *v.* McDonnell, 154 N. Y., 432.
Same case, 155 N. Y., 83.
Henning *v.* Yale, 28 App. Div., 328.

"The case, then, is before the Court upon a general "demurrer, in which must be considered the whole record, "and judgment should be given for the party, who, on "the whole, appears to be entitled to it."

Tyler *v.* Rand, 7 How., 583.
Phillips on Code Pleading, § 85.

It is evident, therefore, that the applicability of the statute of 1897, to the Cohen Sears policies is properly before this Court.

(*b.*) **The Cohen policy became lapsed and forfeited on June 19, 1897, one year after June 10, 1896, the date of the last default, before the passage of the act.**

I.

This construction is not retrospective.

It has been fully shown in this brief that the Act of 1897 controls policies existing at date of its passage and that it is applicable to the Cohen & Sears' policies. The only question here is, what effect the Act had upon its passage where there was a then existing default as in the Cohen & Sears' cases. If the Statutes of

1877 and 1892 apply to the Cohen & Sears' policies at all, and to the extent claimed by opposing counsel, then the Company on April 8th, 1897, could not treat the policies as lapsed because no notice had been sent in May and June, 1896. The Act of 1897 then declared that the effect of such default without notice would only operate to keep the policy alive for a year from the last premium day, and there was no saving clause in the Act of 1897. The policy was subject at all times to the amendment or repeal of the Acts of 1877 and 1892, and the policyholder failed to pay his premiums at his peril of the amendmen tor repeal of such Act. This construction of the Act is not retrospective; each policyholder has the balance of the year, whatever that may be, whether one month or eleven months from the passage of the Act in 1897, within which to pay up his premium, but the prohibition against forfeiture expires when the year lapses.

Cohen defaulted June 1893, 1894, 1895, 1896. No notice having been sent the policy was not forfeited. This was the condition of things on June 10, 1896, and would have continued unless the legislature had intervened. During 1896 Cohen could at any time have paid up his premiums with interest, and restored his policy. *He had no other rights.* By the terms of his contract it was forfeited, but the statute as to notice held this forfeiture as it were in suspense. It did not relieve him from the obligation to pay his premiums. It simply prevented the contracted effect of non-payment from taking place. There was no vested right in this effect. Cohen could say I paid no premium, but you have sent no notice, therefore my contract can not be forfeited for that non-payment. We must admit that but for the Act of 1897, the Cohen policy could not be forfeited for non-payment of the premium of June 1896, until the statute of limitations had run, and it is not now important to determine whether that statute was the legal or equitable statute. But there is no vested

right in the length of the time granted by a statute of limitations, and there is nothing retrospective or violative of any obligation of a contract in a legislative act shortening a statute of limitations after it has begun to run, provided the party effected has an opportunity to act in preservation of his rights before the action of the statute becomes conclusive. Cohen had no vested right. Doubtless the legislature could not remove the prohibition for forfeiture without an opportunity to Cohen to pay up, and this is precisely what they did. The Legislature gave him until June 10, 1897, to pay up, and if not, the forfeiture took place. There is no retrospective or retroactive effect in this. The Legislature acted on an existing default, and declared the future rights of the parties. The Legislature did not in any way destroy the existing privilege to pay up while limiting it.

Again, when June 10, 1897, arrived, Cohen did not pay, and the Legislature had declared that no notice need be sent as his postoffice address was not in the State of New York. There was no retrospective or retroactive effect in this.

Retrospective or retroactive statutes relate to past acts and transactions, and operate on such acts and transactions, and change their legal character or effect.

The past act or transaction was the non-sending of the notice June 10, 1896, and the consequent legal effect of an existing non-forfeiture.

The act of 1897 did not change the legal character or effect of this, or did not operate on this beyond limiting the time of paying up to June 10, 1897. After April 8, 1897, Cohen could have paid up.

It is conceded that not a single premium had been paid subsequent to June 11th, 1892, and that every premium to the death of Cohen September 21, 1897, remain unpaid and in default. Now when the act of April, 1897, was passed, the policy holder was advised

h is premiums were unpaid ; that nothing stood between him and the consequences of his defaults save the former legislation of the State of New York, which had been taken away. He was at liberty to promptly make payment and to see to it he did not run the hazard of death with these premiums unpaid and in default, because he was advised that unless the premiums were paid within one year after they fell due, that neglect of itself operated as a termination of the policy. He was further advised that if he left defaulted premiums unpaid and should die, that no recovery could be had unless the action were instituted within one year from the date of default in the payment of an installment of premium claimed to be due. Nobody in the case disputes that such premiums were due and in default. The plaintiff in the case adopts that view and claims the right to make such payments out of the amount of the policy. The Court adopts the same view of all these premiums being unpaid and in default and makes deduction for each of them and deduction for interest from the time that they respectively should have been paid. The insurance company makes claim that each of these installments has been due and in default from the time it should have been paid, and that such default has operated as a termination of the policy. Now in this conceded state of facts, *when*, after the death of the insured, must the action be maintained in order to have the benefit of the statute ? It is through the statute alone that the right comes. It is not in form a statute of limitation, but a statute preserving and giving a right. That statute declares : "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the date upon which default was made in paying the premium, installment, interest or portion thereof for which

it is claimed that forfeiture ensued." Now the words "forfeited policy," as we have shown, have the definition the legislature itself has given them in the act, that is, a policy that has not been renewed by the payment of the premium within the specified time. The meaning of this act is as if it read "no action shall be maintained to recover upon a policy, the payment of whose premium is in default, unless that action is commenced within one year from the date upon which that default occurred." Clearly the premium falling due June 11, 1896, was not paid—clearly such non-payment caused a lapsing of the policy for not having been made within one year from June 11, 1896.

II.

Even if our construction be considered retrospective, this constitutes no objection to such construction.

There is no constitutional provision in New York as in some States against retrospective legislation.

The Act of 1897 is a remedial act. There is no limitation of the act to subsequent defaults. The main error lies in treating an existing default where there has been no notice, as though the policyholder thereby acquired a vested right. But a vested right in what? Is it a vested right in not having the company forfeit his policy? If so, that right depends on his default without notice. But he can at any time pay up arrears. When the next premium due date arrives he is not relieved from the obligation to pay the premium, because of the prior default and absence of notice. Opposing counsel misuse in this connection the language of the Courts as to the statute

being part of the contract, and that, as there was no notice the premium never became due. But no such language has ever been used in connection with a discussion of the effect of an amendment of the statute, or the effect of successive defaults. The premium becomes due, there is obligation to pay, the statute only affects that part of the contract which declares the result of not paying. The statute was applied by the Courts to existing policies, for the very reason that it did not impair the obligation on the part of the policyholder to pay his premiums to the Company. It simply imposed a condition precedent to forfeiture. The Act of 1897 did not interfere retrospectively with this condition precedent on June 10, 1896. The default was in the past, it is true, but the prohibition had its full continuous effect up to June 10, 1897.

The notice is not by this construction dispensed with in the case of a pre-existing default, but a statutory effect of want of notice continues, until the next premium due date, when it is dispensed with.

It may be a settled rule that Courts uniformly refuse to give to statutes a retrospective operation, *where rights previously vested are injuriously affected*, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.

Cook *vs.* United States, 138 U. S., 181.

But in this case there is no right previously vested and injuriously affected. Cohen had no notice June 10, 1896, and he did not pay, and the policy was not forfeited, and the effect of that lack of notice expired on June 9, 1897.

III.

The statute bar of one year in the Act of 1897 is not a State statute of limitations, but a bar connected with the rights given by the statutes of 1876, 1877, 1892 and 1897.

Prior to the statute of 1876 no statutory notice was necessary in the State of New York. Notice of default, and consequent forfeiture, were left completely under the control of the parties to the contract.

But after 1876, in the case of New York business, unless the statute was waived, the result of a default was not the termination of the contract unless the statutory notice had been sent.

The object of the act was to meet an assumed forgetfulness of policy holders. It soon, however, began to be used for speculative purposes by representatives of deceased policy holders who had abandoned their contracts.

Such a misuse of the statute was monstrous, and, instead of being a protection to policy holders, it became an instrument of fraud upon the companies and other policy holders.

The nature of the insurance contract requires an *annual* payment to enable the company to meet the obligations of the contract.

It might be reasonable to provide that *one* default should not operate to lapse the contract unless the policy holder had a written notice of his obligation to pay, but it was unreasonable to have absence of notice operate to continue insurance indefinitely without further payment of the annual sum required to produce the proceeds of the insurance contract.

This led to the affixing by the Act of 1897 of the conditions found in that act to the effect of the absence of notice.

This statute belongs to that class of statutes which are referred to by Mr. Justice PECKHAM in Bear Lake Irriga-

tion Co. *vs.* Garland, 164 U. S., 1, at page 14, where he says: "It may be assumed that where a statute creates a "right not known to the common law, and provides a "remedy for the enforcement of such a right, and limits "the time within which the remedy must be pursued, the "remedy in such case forms a part of the right, and must "be pursued within the time prescribed, or else the right "and remedy are both lost."

So in Hill *vs.* Supervisors, 119 N. Y., 347: "It must "be evident that, as this action is brought under a special "law and is maintainable solely by its authority, the limi- "tation of time is so incorporated into the remedy given "as to make it an integral part of it and the condition "precedent to the maintenance of the action at all."

The case of Hamilton *vs.* Royal Ins. Co., 156 New York, 338, commenting on this, says: "It is doubtless true that "where time is the essence of the right created, and a lim- "itation as to the time of the enforcement is a part of the "statute under which the right arises, so that there is no "right of action independent of the limitation, the limi- "tation extinguishes the right rather than affects the "remedy, and such contracts are not subject to the exemp- "tion contained in the Statute of Limitations."

IV.

Such statute bar as this is enforceable in any jurisdiction where the statute right is asserted.

Mrs. Cohen, in the United States Court in the State of Washington, asserted her rights in the policy as an existing contract on Sep. 21, 1897, when Cohen died, and based these rights on the New York statutes. If the U. S. Court sitting in Washington adopts the New York

statute as a rule of right to be administered within its jurisdiction, it must also administer the right subject to the limitations which have been made a part of its existence by the act of 1897.

This principle was declared in the Harrisburg, 119 U. S., 199, where it was held as follows: (head note)

In the absence of an act of Congress or a statute of a State giving a right of action therefore, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence.

If a suit *in rem* can be maintained in admiralty against an offending vessel for the recovery of damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence, when an action at law is given therefor by statute in the State where the wrong was done or where the vessel belonged (which is not decided), it must be commenced within the period prescribed by the State statute for the beginning of process there; the time within which the suit should be commenced operating as a limitation of the liability created by statute, and not of the remedy only.

This Court, in its opinion, on page 214, says:

"This brings us to the second branch of the question, "which is, whether, with the statutes of Massachusetts "and Pennsylvania above referred to in force at the time "of the collision, a suit *in rem* could be maintained against "the offending vessel if brought in time. About this we "express no opinion, as we are entirely satisfied that this "suit was begun too late. The statutes create a new "liability, with the right to a suit for its enforcement, "provided the suit is brought within twelve months, "and not otherwise. The time within which the "suit must be brought operates as a limitation of the

" liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liabilty and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and that the suit was not brought until February, 1882, while the law required it to be brought within a year.

A similar question arose in the case of Cavanagh *v.* Ocean Steam Navigation Co., 13 N. Y. Supplement., 540, where an action was brought against a British corporation for a death on the high seas. The action was based on " Lord Campbell's Act." The Court held that the one year limitation in that act applied, and not the Code of Civil Procedure of New York. The Court said :

"The right of action, is given by the act of parliament. In "the complaint the suit is grounded on that act alone, and, " as Judge EARL says in Robinson *v.* Navigation Co., [112 "N. Y. 315] 19 N. E. Rep., 625, the cause of action exists only " by virtue of that statute. Without it no suit could be " maintained here. McDonald *v.* Mallory, 77 N. Y., 546; " Leonard *v.* Navigation Co., 84 N. Y., 48; Debevoise *v.* " Railroad Co., 98 N. Y., 379; Vandeventer *v.* Railroad

"Co., 27 Barb., 244; Whitford *v.* Railroad Co., 23 N. Y., "465. In the last cited case it is said that 'if the state "in which the injury is committed has declared the con- "sequences, and defined the liability therefor, "and de- "fined the liability therefor," that law must govern,' and "that the rule of decision is the law declaring that "liability; and in the same case it is further remarked "(Denio, J.) that we administer the foreign law from the "proofs as we find it to be. The limitation of time in "this foreign statute is not an immaterial incident affect- "ing the remedy only; it is more than a mere matter of "unimportant detail, separated from the liability itself "created by the statute. It is part of it. Any restraint "or circumspection the sovereign power enacting a law "chooses to put upon its operation is an integral part of it "and inseparable from the right or liability created by it. "If it be a limitation of time within which a liability must "be enforced, that limitation is of the essence of the lia- "bility. It was recently so held in Hill *v.* Supervisors, "119 N. Y., 344, 23 N. E. Rep., 921, and such is the view "taken by the Supreme Court of the United States of "Statutes of Massachusetts and Pennsylvania in *pari ma- "teria* with the English Statute. In a proceeding in the "United States Courts the Statute referred to came under "consideration (The Harrisburg, 119 U. S., 199, 7 Sup. "Ct. Rep., 140), and the Court (WAITE, C. J.) says: "'The Statutes create a new legal liability with a right to "a suit for its enforcement, provided the suit is brought "within twelve months, and not otherwise. The time "within which the suit must be brought operates as a "limitation of the liability itself as created, and not of "the remedy alone. It is a condition attached to the right "to sue at all.' 'Time has been made the essence of the "right, and that right is lost if the time is disregarded.' "As thus defined, the right of action is conditional. "The limitation inheres in the right itself. It does not "relate to the remedy alone, and the provisions of the "Code of Civil Procedure invoked by the plaintiff as the "law of the forum do not apply."

The *Cavanagh* case (*supra*), was cited and relied upon in *Kiefer* v. *Grand Trunk Ry. Co.*, 12 App. Div., 28 at 33

(construing and applying Ontario Lord Campbell's Act) S. C. affirmed on this opinion in 153 N. Y., 688, the effect of which was of course to adopt the reasoning of the Court below.

See also

Daily v. *N. Y. Ontario & Western Ry. Co.* (February, 1899), 57 N. Y. Supp., 485, S. C. 26 Misc. Rep., 539 (construing and applying Penna. Lord Campbell's Act sued on in New York, limit 1 year) citing late cases.

So *Boyd* v. *Clark*, 8 Fed. Rep., 849, per BROWN, D. J. (now Mr. Justice Brown of the Supreme Court of the United States) construing and applying Ontario Lord Campbell's Act and sustaining demurrer to declaration because action not brought within the time limited by *that* act.

See also

City of Eureka v. *Merrifield* (Kansas Court of Appeals) 58 Pacific Rep., 243.

Barker v. *H. & St. J. R. R.*, 91 Mo., 86 at 94.

Taylor v. *The Cranberry Iron Co.*, 94 N. Car., 525.

Lambert v. *Ensign Mfg. Co.*, 42 West Va., 813.

The Corsair, 145 U. S., 355 at 344.

So in Palen *vs.* Johnson, 50 New York, 49, where a statute gave the borrower the right to recover back usurious interest within one year, the Court says at p. 52: "The "limitation is co-extensive with the right declared, and "plainly implies a prohibition of any action by that party "after one year."

So *Eastwood* v. *Kennedy*, 44 Maryland, 563.

(The right to recover for illegal interest being given by Act of Congress must be subject to the terms prescribed by that Act as to the time within which the right must be asserted).

So *Hudson* v. *Bishop*, 35 Fed. Rep., 820, per Brewer, J., now Mr. Justice Brewer of the Supreme Court of the United States. (Action on statutory bond with special limitation—limitation must be observed).

So in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. Rep., 533 at 535-536, sustaining defendant's demurrer to petition.

("The statutory remedy [a two year limit] must be pursued as granted by 'Congress, else there is no right of action.")

Ibid p. 536 top of page.

So where a statute forbids actions of a specified class or nature to be brought until after the performance of a condition precedent such as audit, demand on presentation, the complaint is bad on demurrer if it does not show performance of the condition.

Reining v. *City of Buffalo*, 102 N. Y., 308, 311.

So *Selover* v. *Coe*, 63 N. Y., 438.

Cohen insured in Washington with a foreign company and he was bound by the provisions in the statute governing it, if those statutes ever applied to his policy. "It "must be borne in mind that one who deals with a foreign "corporation must take it as a creature of the law of its "own country, *subject to the legislative control* and direc- "tion that may be properly exercised over it at the place "of its creation" (Murfree, pp. 23, 24).

POINT V.

If the Cohen policy did not become lapsed and forfeited on June 9, 1897, one year after the premium due June 10, 1896, because a year had not elapsed from April 8, 1897, yet it became lapsed and forfeited on June 10, 1897, by its terms, for on that day default was made, and by the express provision of the act no notice was necessary because Cohen's post office address was not in the State of New York.

The company contends that should the proper construction of the act be that the full year referred to in the act must elapse after the act, or after a default subsequent to the act, then while this might apply where post office addresses were within the State of New York, it would not apply where there were no such post office addresses, but the obligation to send notices in such cases at the latest terminated on April 8, 1897. And this was true in the Cohen case.

The language of the act of 1897 is "at his or her last "known post office *address in this State.*"

The only case known of where the Act of 1897 has been construed on this point is the recent case of Rosson *vs.* Equitable Life, decided in the Superior Court of Los Angeles, California, in which case TRASK, J., said: "Since that decision (the Griffiths case) was rendered the "New York statute has been amended. It did not then "provide, as it does now, that the notice shall be mailed "to the 'insured at his or her last known post office ad- "dress in this State.' The important words 'in this "State' were inserted in 1897. This part of the law, at "least, therefore, cannot govern California contracts."

See Opinion annexed hereto, Exhibit E.

Whether the Act of 1897 be regarded as a new law or as simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8, 1897, no notice had to be sent to Cohen, as he was not a resident of the State of New York.

This act took effect April 8th, 1897, and Cohen was alive on June 10, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplanter Case, 93 Fed. Reporter, 721, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Cohen, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the defendant in error, if Cohen was sent no notice on June 10, 1893, and did not pay his premium at that time, his policy was not void and forfeited; but the failure to send a notice could not possibly carry the policy any further than the payment of a premium would have carried it; so by successive failures to send notices, even if there were successive failures to pay premiums in 1893, 1894, 1895 and 1896, his policy was carried in force up to June 10, 1897, but at that time, the defendant was obliged to send no notice, and if he failed to pay his premium then the policy was forfeited and lapsed.

In both the Cohen case and the Sears case a premium became due after April 8, 1897, during the lifetime of the insured; in the Cohen case on June 10, 1897, and in the Sears on May 18, 1897.

In the Cohen case the first default was June 10, 1893, so that no question can possibly arise in this case as to the effect of the saving clause in the Act of 1892, referred to by Hanford, J., in the recent Hathaway case.

Under the most extreme view that can

be taken the defendant in error Cohen cannot recover, because the action was not brought within a year from June 10, 1897.

We contend that the Legislature had a right by the Act of 1897, to operate upon the existing default occasioned by the non-payment of the premium due on June 10, 1896, and, in fact, to prescribe a short statute of limitations, within which Cohen could bring an action either on the policy or to reinstate it and prevent a forfeiture, such short statute to be effective within a year from the default occurring previous to the Act of 1897. It is impossible to believe that the Statute of 1897 could ever be construed in the face of its plain language to refer merely to defaults occurring after it went into operation, but taking the most extreme view that can be held of the defendant in error's rights, even if the statute of 1897 be assumed to refer only to defaults occurring after it went into operation, no sound reason can prevent the effect of the language of the statute by which the company is not clearly prevented from declaring forfeited any policy after a year from the time that there may be a default in the payment of a premium thereon falling due subsequent to the passage of the statute. There can be no vested right that the legislature could not, with respect to premiums falling due subsequent to its action, change the prohibition against the company's declaring the policy forfeited for non-payment of premiums from the ordinary time given by the statute of limitations to one year.

The right given by statute could be taken away by statute. The right given to the policyholder to pay his premium, to be exercised within the time of the running of the statute of limitations, could be limited by subsequent statute with regard to premiums falling due after

the passage of the statute to a time shorter than that given by the effect of the statute when originally passed, which, of course, in the absence of the declaration of a period of time in the statute would be that of the statute of limitations of the forum where judicial action might be invoked.

No possible complaint can be made if the one year provided by the statute is allowed to elapse before forfeiture when there has been no notice.

"The act, in terms, purports to preserve all existing "rights of taxpayers for the period of six months after "the passage of the act and to establish a rule of evidence "to govern future controversies, which made such deeds "presumptive evidence of the regularity of the proceedings "upon which they were based, and after two years from "the recording, conclusive evidence of the same matters. "With reference to the six-months' provision, it operates, "as to all existing cases, as a limitation upon the tax-"payer's right to assert his claims under pre-existing "laws, and, as to all future cases, provides that the lapse "of two years from recording shall make that which was "before presumptive evidence only, conclusive upon the "rights of the parties. The act seems to be, in its princi-"pal aspect, one of limitation, and, as such, is within the "constitutional power of the Legislature to enact as affect-"ing future cases, and, we think, *within settled rules*, "*equally within its power as to existing rights.* It gives, "in all cases, a time for the person aggrieved to establish "his rights unaffected by the provisions of the enactment; "but provides that after the lapse of a certain time the "Comptroller's deed shall be conclusive evidence of the "regularity of the proceedings upon which it is based. "Legislation of such a character has frequently been "held within the constitutional power of the Legislature "to enact."

People *vs.* Turner, 117 New York, 233.

POINT VI.

If the Court holds that the true construction of the statutes of 1877 and 1892 required a notice to be sent Cohen unless waived then it is claimed by the plaintiff error that the sending of any statutory notice was waived by Cohen by the express terms of the policy.

For argument on this point, see Phinney brief, Point V.

See Dannhauser *vs.* Wallenstein, 28 N. Y., Miss. R., 690, discussed on p. 124 of our original brief.

In Griffith *vs.* Earl of Dudley, 9 Q. B. D., 357, also it was held that it was competent for a workman to contract with his employer not to claim compensation for personal injuries under the Employees Liability Act. The Court said as to the claim that the contract was against public policy: "It is at least doubtful, whether, where "a contract is said to be void as against public policy, "some public policy *which affects all society is not* "*meant.* Here the interests of the employed only "would be affected. It is said that the intention of "the legislature to protect workmen against imprudent "bargains will be frustrated if contracts like these are "allowed to stand. I should say that workmen as a "rule were perfectly competent to make reasonable "bargains for themselves."

A strict adherence to the erroneous doctrine of the Griffith case as to waiver would result in depriving the company and the insured of all power to agree upon any detail such as another form of sending the notice.

But the Court of Appeals in New York sanctions a

more liberal interpretation, for in the Carter case (110 N. Y., 15), the Court says: "It would, of course, be "competent for him to agree upon some other mode of "address." That is, the parties could contract respecting the statutory notice.

POINT VII.

The contract was abandoned by Cohen, and this he had a right to do.

For argument on this point see Phinney brief, Point VI.

If notice was required, Cohen, and not the plaintiff was the one to receive it. He was under no obligation to keep up the policy, and could abandon paying of premiums at any time, and the beneficiary would thus lose all interest in the policy.

POINT VIII.

The alleged cause of action was not pleaded and there was a departure. For argument on this point see Phinney brief Point VII.

POINT IX.

The judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
Of Counsel.

APPENDIX.

Exhibit A.

ROSENPLANTER *v.* PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court, W. D. Tennessee, W. D. January 7, 1899.)

1. LIFE INSURANCE—CONSTRUCTION OF POLICY—TERM INSURANCE.

A life insurance policy in terms insuring the holder for one year from its date, but containing a provision for its renewal from year to year during the life of the assured by the payment of successive annual renewal premiums, is not an entire contract for the life of the assured, but is a valid "term insurance contract for one year," within Laws N. Y. 1892, c. 690, § 92, which is specially excepted by that section from its general provision that no policy shall be declared forfeited or lapsed for nonpayment of premiums without the prescribed notice to the insured.

2. SAME—STATUTES REGULATING FORFEITURES—EFFECT OF REPEAL.

Laws N. Y. 1877, c. 321, providing that no policy of life insurance should be declared forfeited unless a prescribed notice should be served on the insured, did not become a part of the contracts created by policies

subsequently written in the State, so that its repeal impaired the obligation of such contracts, but was merely a regulation for the government of insurance companies, belonging to the class of remedial statutes which it is competent for the legislature to enact, repeal, or amend, making the same applicable to existing contracts, without affecting the obligation of such contracts.

On Demurrer to Declaration.

The defendant issued a policy of insurance upon the life of Carlos G. Rosenplaenter, in favor of his wife, Mary Anna, the above-named plaintiff. It is dated on the 1st day of April, 1889, is for the sum of $10,000, and payable, at the death of the life assured, to the beneficiary. The consideration named, besides the conditions and agreements indorsed upon the back of the policy, is: "The payment of the first annual premium on this policy, and in semi-annual equivalents of $168.60, each payable on the 1st days of April and October, respectively,"—in consideration of which payment the defendant company promises to pay the plaintiff the sum of $10,000 "within ninety days after the acceptance of satisfactory proof, at its office in the city of New York, of the death of Carlos G. Rosenplaenter, * * * provided such death shall occur before twelve o'clock noon on the 1st day of April, A. D. 1890." The following is one of the stipulations of the policy: "And the said society further agrees to renew and extend this insurance upon like conditions during each succeeding year of the life of the insured from date hereof upon the payment of the annual renewal premium for the actual age attained, in accordance with the schedule rate printed on the next page of this policy for each one thousand dollars insured, except as reduced by the application of the surplus and guaranty fund, such payment

to be made in semi-annual equivalents, payable on the first days of April and October, respectively, in each succeeding year." Among the conditions and agreements referred to in the policy is this: "Sec. 3. The annual premiums of this policy may, by consent of the society, be paid by the half-yearly or quarterly equivalent, as indicated below, if desired; but failure to pay when due any such semi-annual or quarterly equivalent will then terminate the policy. In case of claims by death, any unpaid portion of the annual premium will be deducted from the sum insured."

The declaration, after counting on the policy, avers that the premiums were paid, in accordance with the terms of the policy, on the 1st days of April, 1889, October, 1889, April, 1890, October, 1890, and the 1st day of April, 1891. It is then averred that the life assured died on the 5th day of September, 1894; that the plaintiff applied for proper forms and blanks to make the required proofs of loss, but these were refused, and she was informed that the policy would not be paid, because it had lapsed for nonpayment of premiums. The declaration pleads, as an avoidance of the alleged forfeiture, a statute of the State of New York, setting out such parts as are deemed material in hæc verba; but, for convenience, the whole of said statute is here quoted, as follows (Chapter 321, Laws 1877):

"SECTION 1. Section one of chapter three hundred and forty-one of the Laws of Eighteen Hundred and Seventy-Six, entitled 'An act regulating the forfeiture of life insurance policies,' is hereby amended so as to read as follows: 'Sec. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed

notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest. anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice: provided however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.'

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

After averring that the policy was a New York contract, and that in the application for the policy it was stipulated that it should at all times and places be construed to be a contract made in the city of New York, the

declaration avers that the defendant company failed to give or mail the notice required by the said statute, but did mail a notice on the 1st day of September, 1891, to the insured, that the said premium was payable October 1, 1891, which the plaintiff avers was only twenty-nine days, and not the thirty days required by the statute, wherefore the policy remains in full force and effect. It is then declared that the life assured kept and performed all the conditions required of him except the nonpayment of the premiums payable October 1, 1891, April 1, 1892, October 1, 1892, April 1, 1893, October 1, 1893, and April 1, 1894. The declaration is not very clear in its allegations, but may be taken to aver—what is understood to be the fact—that after the notice mailed on the 1st day of September, 1891, no notice was given by mail of the subsequently accruing premiums, which were not paid. This may be held to be included in the general averment that the defendant failed to comply with the statute in regard to notice, and that the said policy is still in full force and effect.

There is a demurrer to this declaration upon the following grounds:

First.—The declaration shows that notice was mailed on the 1st day of September, 1891; that the next premium payable was October 1, 1891, which the life assured or the plaintiff failed to pay. Therefore it appears that the policy was forfeited for the nonpayment of the premium due October 1, 1891.

Second.—The declaration shows that the first year of insurance expired at noon on the 1st day of April, 1890; that the company agreed by the contract to renew and extend the insurance each succeeding year, upon the payment of the annual renewal premium for the actual age attained according to the given schedule, the payments to

be made in semi-annual equivalents, payable on the 1st days of October and April, respectively, in each succeeding year; that the life assured paid only down to and including the payment due the 1st day of April, 1891, failing to pay the premiums due on the 1st days of October, 1891, April and October, 1892, April and October, 1893, and April, 1894; that if the notice mailed on the 1st day of September, 1891, was invalid for any reason, then the only effect of its invalidity was to extend and renew the policy of insurance to the 1st day of April, 1892, and not thereafter; that if no notice was then given, the only effect of the failure was to renew the policy to the 1st day of October, 1892; that after that date the above statute of 1877 was altered, amended, and repealed by section 92 of chapter 690 of the Laws of New York for 1892, which is as follows: "Sec. 92. No Forfeiture of Policy without Notice. No life insurance corporation doing business in this state, shall declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited, or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." This section was amended by Chapter 218, Laws 1897, by adding the following: "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

After thus pleading the New York statute of 1892, the second ground of the demurrer proceeds to aver that the effect of the act of 1892 was to so amend the law of 1877, in respect to such forfeitures and lapsing of policies as to except from the operation of the law of 1877 all policies based upon the payment of monthly or weekly premiums, "or where the policy issued was for a term of one year or less"; that it appears from the averments of the declaration that the contract of insurance set out was for a term

of one year or less, wherefore the policy was not within the operation of the law of 1877; and that upon the failure of the life assured or the plaintiff to pay the premiums due April 1 and October 1, 1892, and the subsequently accruing premiums, by the express terms of the policy it became lapsed and forfeited.

Third.—The third ground of demurrer is that the declaration shows that the policy insured the life assured from the 1st day of April, 1889, until the 1st day of April, 1890; that it was the agreement of the defendant company to renew and extend the life insurance under like conditions during each succeeding year of the life assured, upon the payment of the annual renewal premiums for the actual age attained, according to the rates in the schedule, the payments to be made semi-annually on the 1st days of April and October in each succeeding year; that since the declaration shows that the premiums were only paid down to and including the 1st of April, 1891, and that there was a failure to pay the premium of October 1, 1891, under the terms of the policy the renewal effectuated April 1, 1891, expired April 1, 1892; that the failure of the defendant company to give the required statutory notice of the premium due October 1, 1891, could do no more than would have been done by the premium if paid, namely, to continue the policy in force until April 1, 1892, by the very terms thereof; that the stipulation on the part of the defendant company to renew the policy for another year from April 1, 1892, to April 1, 1893, depended upon the performance by the assured of a precedent condition, namely, the payment of the renewal premium of April 1, 1892, which condition not having been performed, the policy was, by its own terms, lapsed and forfeited.

The above statement of the third ground of demurrer is somewhat more specific than the demurrer itself, and

comprehends a suggestion made at the argument, namely, that the failure of the insurance company to give notice of the forthcoming premium could have no more effect than the payment of the premium itself would have had; but it is a fair inference to be deduced from the groundwork of the demurrer, and is here stated in that form to exhibit more fully the cause of the demurrer.

WILKERSON & PIERSON, for plaintiff.

FRANK P. POSTON, for defendant.

HAMMOND, J. (after stating the facts as above). This demurrer must be sustained. The plaintiff claims too much for the effect of the failure to give notice of the forthcoming premium due October 1, 1891. It may be conceded, as it must be, that the 29 days of the actual notice is not the 30 days of the statute, and yet it does not follow that this policy of insurance was forever kept in force thereafter by that mere circumstance. The forfeitures incurred in the failure to pay the subsequently accruing premiums of April and October, 1892, of April and October, 1893, and of April, 1894, must each depend upon its own circumstances, and neither of these failures can receive any aid from the failure to give notice of the premium due on the 1st of October, 1891.

The real question in this case is whether or not the failure to pay the premium due on the 1st of April, 1892, has been excused by any averments of this declaration. But, before considering that question, it is well enough to note that, by the terms of this policy, these were not semi-annual premiums. The premiums of the policy are annual premiums; but it is agreed that each premium may be paid "in semi-annual equivalents," payable on the 1st days of April and October. Nevertheless, the whole policy shows that the groundwork of it is annual premiums, the importance of which distinction is apparent

when the policy is read in reference to the statutory regulations involved in the controversy.

It was indeed decided in Fearn *v.* Ward, 80 Ala. 555, 562, 2 South. 118, that:

"The contract of life insurance has its inception in the issue of the policy, and is a complete and entire contract for the life of the assured, continuing during life, and payable at death when no earlier definite period is fixed, but subject to be discontinued by nonpayment of the premiums as agreed, such payments being conditions subsequent. The annual premium is not paid in consideration of insurance for a single year, and its payment is not a condition precedent to renewal. Each premium constitutes a part of the consideration of the contract as one and entire, and the amount is fixed and regulated by the prospective duration of the life of the assured, which enters as an element into the contract."

This also had been decided before, in the case of Insurance Co. *v.* Statham, 93 U. S. 24. It is admitted in this opinion that the contrary view has been taken by respectable authorities, but that is undoubtedly the general rule. However, this is to be understood only of the character of contracts involved in those cases where the insurance was of the form in controversy in those cases. To use the language of the Statham Case, "these policies did assure the life of the party named in a specific amount for the term of his natural life." And it is to that kind of a policy that those adjudications must be confined. They do not establish, and it cannot be affirmed, that all policies of insurance are in that form, or of that kind. And there is no reason why an insurance company and the party assured may not make an agreement for a policy of insurance from year to year if they choose to do so, and that is precisely what the parties to this contract did. If they had set to work to make a contract with the intention of putting it in a form that would obviate the ruling in those

two cases, they could not more effectually have accomplished that purpose than they have by the language of the policy now involved. Its distinct promise to pay is at the death of the life assured, provided such death shall occur before 12 o'clock noon on the first day of April, 1890,—precisely one year from the date of the policy. This was an insurance for a single year, and no more. The next succeeding clause of the policy prescribing the terms upon which it might be extended distinctly says that such renewals shall be for each succeeding year of the life assured, from the date thereof. And the mere reading of the whole stipulation shows that the policy is an insurance for one year, with the right of renewal at the expiration of each year of insurance; and it is no more than this. There is no principle of law which disables the parties from making a contract like that, and therefore the decisions which have been cited do not apply to this case.

Under the New York Statute of 1877 (Chapter 321), quoted in the foregoing statement, there would be no doubt, in my judgment, of the right of the plaintiff to recover on this policy. The proviso of the first section was not complied with, because there were only 29 days of notice given, stating when the next premium would fall due, by the letter which was mailed on the 1st day of September, 1891. This was distinctly decided in the case of Hicks *v.* Insurance Co., 9 C. C. A. 215, 60 Fed. 690, which decision is supported by the adjudications in the State of New York upon that subject. The premium falling due on the 1st of October, 1891, not being paid, did not cause a lapse of the policy, or entitle the defendant to declare a forfeiture, for it was only by giving a new notice under the main requirement of the act that the defendant company could have secured a lapsing or forfeit of the policy for the failure. It is not shown by anything in the record, and it was not pretended in the argument, that

any such notice was given. Neither did the company give the notice required by the statute when the premium fell due on the 1st of April, 1892; nor the semi-annual premium that fell due on the 1st of October, 1892; nor the semi-annual premium that fell due on April 1, 1893; nor the semi-annual premium that fell due October 1, 1893; nor that of April 1, 1894. As to none of these failures did the company take the pains to give the life assured or the beneficiary notice that a forfeiture would be claimed for such nonpayment, and, not having done this, they could claim no forfeiture for any of those failures, under the act of 1877.

But it is my opinion that the case is governed, not by the act of 1877, but by chapter 690 of the Acts of 1892, quoted in the foregoing statement. The date of the passage of that act does not appear, but, if it be assumed that it was passed on the very last day of the year 1892, it would govern the premium falling due April 1, 1893, October 1, 1893, and April 1, 1894, none of which were paid, and as to none of which, under the act of 1892, was the life assured or the plaintiff entitled to notice as prescribed by the act, because, as I have endeavored to show, this was "a term insurance contract for one year," which was especially excepted from the provisions of that act requiring notice to be given to secure a forfeiture on the part of the insurance company. I do not see that there is any room for doubt of this proposition.

But the plaintiff undertakes to escape a forfeiture under that act by contending that this policy is governed by the act of 1877, and not the act of 1892. The reasoning upon which this contention goes is that the provisions of the act of 1877 were incorporated by the statute into the policy with the same effect as if the provisions of that act requiring notice had been, in terms, written in the stipulations of the policy itself, and that the subsequent

act of 1892 is of no effect, because it would be unconstitutional as applied to such a contract, by impairing its obligation. I cannot assent to this. If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them; wherefore it would be enforced by the courts as the agreement of the parties. But the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice, as required by the act, of the nonpayment of premiums, before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract, which it was entirely competent for the legislature to withdraw, alter, or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel; that is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract, by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but, if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.

Judge WALLACE says, in the case of Hicks *v.* Insurance

Co. *supra*, that the policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures as completely as though the statutory conditions had been explicitly incorporated in them. This is true only *sub modo;* but it was not the intention of the learned judge to declare that a repeal of a statute respecting forfeitures would impair the obligation of the contract. He had no such question as that before him, and the inference that is drawn from this segregated sentence of his is quite gratuitous. It must rest upon its own merits, and can have no aid from this sentence of that decision. Such statutes as these assume by their very existence that the parties have, by the terms of their contract, incurred a forfeiture, and they had no design of prescribing conditions under which a forfeiture should take place, but only those under which, by legislative bounty, the forfeiture should be condoned or relieved against after it had been incurred. They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the State of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may withdraw it; and it is a mistake to suppose that the right to it becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time.

I do not see that the case of McCracken *v.* Hayward, 2 How. 608, cited by counsel for plaintiff, has any bearing on the question. In that case it was determined that a state law which prohibited property from being sold on

execution at less than two-thirds of its appraised value impaired the objection of contracts; and this, because the plaintiff had a right, at the time the contract was made, to a judgment and execution according to the then-existing laws, which right was as essential a part of the obligation of the contract as if it had been set forth in its stipulations in the very words of the statute relating to judgments and executions. And, where the existing law allowed the sale of defendant's property, to take that right away was to impair the obligation of the plaintiff's contract. But, before that, in the opinion, the court had been very careful to say that this did not apply to all state legislation on existing contracts as repugnant to the constitution, and the court cited as illustrations such acts of the legislature as recording acts under which an elder grantee would be postponed to a younger. Though the effect of such a law is to render the prior deed void as against a subsequent purchaser, it is not a law impairing the obligation of contracts. And so of statutes of limitations and kindred acts. It is said that the validity of such acts cannot be questioned; that the time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergencies which led to those enactments. It is, in my judgment, to this class of legislation that these New York statutes apply, and not the other. The court cites in support of this classification the case of Jackson *v.* Lamphire, 3 Pet. 280, where it was held that a patent of land from the state did not imply that the patentee or his assigns should enjoy the lands free from legislative regulation, but only that the state would not impair the force of the grant; and regulations requiring them to be recorded, containing certain limita-

tions as to time, were held by the court not to impair the obligation, whether the act of the legislature was one of limitations, or a recording act, or a law *sui juris*, called for by the peculiar situation which invoked its enactment.

In Insurance Co. *v.* Cushman, 108 U. S. 51, 65, 2 Sup. Ct. 245, the supreme court says:

"The laws with reference to which parties may be assumed to have contracted were those which in their direct and necessary legal operations controlled or affected the obligations of such contract."

And it was held that a reduction in the interest as between the purchaser at the sale and the party entitled to redeem did not impair the obligation of the contract.

In the case of Ewell *v.* Daggs, 108 U. S. 143, 150, 2 Sup. Ct., 413, it was held that the repeal of a statute of Texas which made contracts void for usury acted retrospectively, and took away the right of the defendant to make the defense of usury, but that such repeal was not legislation impairing the obligation of contracts. Mr. Justice MATTHEWS uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist the recovery against him of the interest which he had contracted to pay, and it was in its nature a penal statute, inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not the uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws without a saving clause operated retrospectively, so as to cut off the defense for the future even upon actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * * And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a

penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own; and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a complete transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. * * * The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, —a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

In the case of Gross *v.* Mortgage Co., 108 U. S., 488, 2 Sup. Ct., 947, the above case of Ewell *v.* Daggs, was reaffirmed in its application to statutes which made valid contracts which had previously been invalid on account of their noncompliance with prohibitive acts of the legislature; and it is held that these subsequent statutes were not unconstitutional, as depriving the person of his property without due process of law; and Mr. Justice HARLAN makes this observation in regard to such statutes:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a

suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition of public policy which prevented the mortgagee, at the date of the mortgage, from taking the title, which was intended to be passed as security for the mortgage debt."

Further quoting from a previous case, he remarks:

"It is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract."

Nor is it easy to see how a law which restores the stipulations of a valid contract, that have been interrupted by the operation of a statute, can be said to impair the obligation of a contract. Counsel on neither side have cited any case where the question of the impairment of the obligation of a contract in its application to statutes like these of the state of New York, requiring notice to be given before forfeiture of a policy of insurance can be insisted upon, has been considered or determined, and I have found none. But I feel quite sure that the principle enunciated by Mr. Justice Matthews in the case above cited fully applies to such statutes. These parties agreed that the nonpayment of the premium should work a forfeiture. The statute stepped in to relieve against the hardness of that contract, but it created no other or different contract from that which the parties had made. Hence the repeal of the statute only operated to restore the stipulations of the agreement as made between the parties themselves.

It is my opinion that the New York Act of 1892, operated to repeal the Act of 1877, in the matter of statutory regulations concerning notice, and that by the act of 1892, this policy was especially excepted because it is "a term insurance contract for one year." It operated retrospectively, as the act of 1877 did, because by its very

terms it applied to every policy thereafter issued or renewed. The regulations of these two acts as to the notice to be given applied to protect the beneficiaries upon premiums renewed upon policies already existing, as well as to premiums upon policies thereafter issued; and, of course, if the act applies to require notice as to previously existing policies, the later act, exempting these renewals from the requirements of notice, also applies to then-existing policies in its relation to the renewal of premiums. Therefore, when the plaintiff or the life assured did not pay the premiums accruing on the 1st of April, 1893, the 1st of October, 1893, and the 1st of April, 1894, the policy lapsed, and the forfeiture was complete, notwithstanding that no notice was given. Demurrer sustained, and suit dismissed, at plaintiff's costs.

Exhibit B.

No. 695.

United States Circuit Court of Appeals,

SIXTH CIRCUIT.

MARY A. ROSENPLANTER *v.* THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.	Error to the Circuit Court of the United States for the Western District of Tennessee.

SUBMITTED MAY 11, 1899.
DECIDED OCTOBER 3, 1899.

Before LURTON, Circuit Judge, and CLARK and THOMPSON, District Judges.

This was an action upon a policy of life insurance. The defendant demurred to the declaration. The demurrer was sustained as not stating a good cause of action. From the judgment thereon the plaintiff sued out this writ of error.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the Court.

The declaration shows that the contract of insurance upon which the suit was brought was made April 1, 1889. In consideration of the premium paid and stipulated to be paid, the Insurance Society agreed to pay the plaintiff, Mary A. Rosenplanter, the wife of the insured, Carlos G.

Rosenplanter, the sum of $10,000 within ninety days after acceptance of satisfactory proof of the death of said Carlos G. Rosenplanter, "provided, such death shall occur before twelve o'clock on the first day of April, 1890." The said contract further obligated the society "to renew and extend said insurance upon like conditions during each succeeding year of the life of the insured from the date thereof upon the payment of the annual renewal premiums for the actual age attained by said assured, in accordance with the schedule printed on the next page of said policy for each one thousand dollars insured, except as reduced by the application of the surplus and guaranty fund, such payments to be made in semi-annual equivalents, payable on first day of October and April, respectively, in each succeeding year." But it was further provided in said policy that if "the mortality in this society shall continue as favorable in the future as it has been in the past in the largest and best companies, this insurance will be extended and renewed during the whole expectation or probable lifetime of the within named insured, at the rate of premium charged for the first year only of this policy." It was also a term of the policy that failure to pay when due any semi-annual equivalent "will terminate the policy," and that, "subject to the stipulations regarding payment of premiums," the policy should, if the death occurred two or more years after its date, "be incontestable, except for fraud in obtaining this policy."

The form of the policy is not at all like that construed in Life Insurance Company *v.* Statham, 93 U. S. 24, where it was said: "These policies did assure the life of the party named in a specific amount for the term of his natural life." The policy here involved is an agreement for a policy of insurance from year to year, and the payment of an annual premium only paid for an insurance for a single year. The extension of the policy for a succeed-

ing year depended upon compliance with the terms and conditions in respect of a further premium payment to be made by the insured. "It was," to quote the language of the Court of Appeals of New York in McDougal *v.* The Provident Savings Life Assurance Society, 135 N. Y. 551-553, where a policy in essentials much the same was involved, "a contract for an insurance for the term of one year only, providing, however, by its terms, for its renewal for successive years upon compliance by the assured with the conditions named." Nevertheless, the terms upon which it might be renewed by the payment for succeeding years of the same rate of insurance charged for the first year only, notwithstanding the higher rate chargeable for the greater age of the insured, and the growing interest of the assured in the surplus premiums paid by him which go to form a reserve or accumulated fund operating to reduce subsequent premiums, gave to the insured an interest in the contract beyond the mere insurance for the term of a current year. We shall, therefore, assume that this contract was within the meaning and protection of Chapter 321 of the New York Laws of 1877. McDougall *v.* The Prov. Savings Life Ass. Society, 64 Hun, 515. That statute was in force when this policy issued. Among other things it provided that:

"No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on said policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured."

Omitting the description of the part of the notice for the payment of an unpaid premium, and declaring a forfeiture if the notice is not complied with, the final proviso reads:

"Provided, however, that if a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

The contract in question is a New York contract and specifically provides that "at all times and places" it "shall be construed to be a contract made in the city of New York."

The declaration avers that the insured paid the semi-annual premium for April 1, 1889, and the semi-annual premium due October 1, 1889, and the semi-annual premium due April 1, 1890, and the semi-annual premium due October 1, 1890, and the semi-annual premium due April 1, 1891, but that he did not pay the semi-annual premium due October 1, 1891, or the semi-annual premium due April 1, 1892, or the semi-annual premium due April 1, 1893, or the semi-annual premium due October 1, 1893, or the semi-annual premium due April 1, 1894, and that the insured died September 5, 1894, leaving six semi-annual premiums due and unpaid. The averment of the declaration is, that notwithstanding the non-payment of said last six semi-annual premiums, the policy was in force at the death of the insured by force of the said New York statute of 1877. The further averment is, that the said Insurance Society "did mail the notice required by the said statute on the first day of September, 1891, to the insured," of the semi-annual premiums due and payable Oct. 1, 1891, but that said notice was mailed only twenty-

nine days prior to October 1, 1891, and not at least thirty days prior to the maturity of a premium as required by the said statute, and that no other notice in respect to that premium, nor any of those which subsequently accrued, was ever given or mailed. In consequence of this non-compliance with the said statute, it is contended that the said policy was in full force and effect at the date of the death of the insured.

The learned judge who presided in the circuit court yielded to the authority of the case of Hicks *v.* National Life Insurance Company, 60 F. R., 690; and reported as Rae's Executors *v.* National Life Ins. Co., 20 U. S. App., 410; decided by the United States Circuit Court of Appeals for the Second Circuit, and held, that the day upon which this notice was mailed should be excluded in the computation of time, and hence that it had not been mailed thirty days prior to the day when the premium due October 1, 1891, fell due, and that the society was in no better position than it would be if no notice had been mailed. The opinion of the Second Circuit Court of Appeals is based upon the decisions of the courts of New York, and involved the construction of the same New York statute here under consideration. Accepting this opinion as an authoritative interpretation of the law of New York, we concur in holding, that the notice given was not the notice required by that law and was ineffectual to terminate the contract under the provisions in respect to the forfeiture or lapsing of New York contracts of insurance made subject to the provisions of the act of 1877. The notice required by the act of 1877 might be either a notice of the time when a premium would fall due, or of a default in the payment of a premium. If given before default, the requirement is that the notice shall be mailed "at least thirty and not more than sixty days prior to the day when the premium is payable." If given after

a default has been made, the requirement is equally specific that it shall be a notice that a premium is due and unpaid and that if not paid within thirty days "after the mailing" of such notice the "policy and all payments thereon will become forfeited and void." The same section also provides that, "in case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice."

The notice given before the premium fell due was insufficient and no notice whatever was given after the nonpayment of that premium. The effect of the prohibition against declaring a forfeiture of the interest of the assured under the contract was to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulations of the parties to the contrary. The duration of the policy, so long as it was dominated by the statute, was not dependent upon the payment of premiums on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice "mailed" thirty days before the premium was due or by a notice of default and demand for payment within thirty days after mailing such notice. Baxter *v.* Brooklyn Life Ins. Co., 119 N. Y., 450-455.

But for the subsequent act of May 18, 1892, there could be no serious doubt that this policy was in force at the date of the death of the insured, no effectual statutory notice having been given.

Chapter 690 of the Revision of the Statutory Laws of New York, approved May 18, 1892, is a general act revising the whole law of the State of New York in respect of insurance corporations, and expressly repeals all of Chapter 321 of the Act of 1877.

By Section 92 of that act it is provided:

"SEC. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that svch notice has been duly given."

Section 291 of this act provides that no right acquired or accrued, or penalty or forfeiture incurred, prior to October 1, 1892, should be affected by the repeal of the laws theretofore in force, but otherwise manifestly subjects policies then in force to the Act of 1892, in respect of payment of premiums thereafter falling due.

This Act of 1892 excepts from its terms policies which are "term insurance contracts for one year or less." The policy in suit is, as we have endeavored to show, a term insurance contract for one year and therefore falls within the exception of the section. McDougal v. Prov., etc,, Society, 135 N. Y. 551–556. Baldwin v. Prov., etc., Society, 48 N. Y. Supp. 463.

At least three semi-annual premiums, fell due after the passage of this Act of 1892. If this act did not require that notice should be given prior to the falling due of any premium, or notice of any default in payment, as did the act of 1877, then no notice was necessary, except such notice as the contract itself requires.

In the case of Baldwin v. Provident Savings Life Assurance Society of New York, *supra*, there was involved a policy issued in 1885. It was kept alive by payments of premiums until January, 1895. A call for a premium due February 9, 1895, was sent out. The assured died February 19, 1895, without having paid the premium thus called. It was, among other things, contended by the counsel for the beneficiary that this notice was not a sufficient compliance with the terms of this act of 1892, the act in force when the premium fell due. To this the court replied by saying :

"The policy, however, falls within the exception of the section; that is, it is either a policy issued upon the payment of a monthly premium, or it is a term insurance contract for a year or less, in which case no notice is necessary; and in this view we are sustained by the decision of the Court of Appeals in McDougall v. Provident Savings Life Assurance Society (135 N. Y. 551, 556). Judgment should be entered for the defendant."

It is not a question as to whether this policy was "one issued or renewed" after the passage of the act of 1892. It had been kept alive by force of the act of 1877 so long as that statute regulated the subject of forfeitures and notices. When the act of 1877 was repealed by the act of 1892, the whole subject was thereafter regulated only by the latter act. If it did not prescribe some notice in respect to the forfeiture of policies for the term of one year, the only notice which the insured could demand in respect of premiums which should fall due thereafter would be such notices as the contract itself prescribed or which had otherwise become a term of the agreement between the parties. In this view of the case the policy lapsed by reason of the non-payment of the premiums which fell due after the passage of the act of 1892, notwithstanding no notice was given.

But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to

forfeiture without the statutory notice, as such repeal or amendment would impair the obligation of the contract.

To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in and in effect said: "You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums unless you first comply with this statute by giving the notice herein required." The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions.

"The laws with reference to which the parties must be

assumed to have contracted . . . . were those which in their direct or necessary legal operation controlled or affected the obligations of such contract." Conn. Life Ins. Co. v. Cushman, 108 U. S., 51–65.

Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an impairment of vested rights. Conn. Life Ins. Co. v. Cushman, 108 U. S., 51–65; Ewell v. Daggs, 108 U. S., 143; Gross v. United States Mortgage Co., 108 U. S., 477; Butler v. United States B. & L. Ass., 97 Tenn., 679; Curtis v. Leavitt, 15 N. Y., 15, 85; Lewis v. McElvain, 16 Ohio. 347; Trustees v. McCaughy, 2 Ohio St., 152; Cooley Const. Lim., side pages 293–378.

Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying :

"If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company

should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary."

In Gross v. Mortgage Company, 108 U. S. 477-488, the validity of a mortgage was involved which had been made at a time when the mortgage was invalid under the existing local law but which was subsequently validated. The validating act was said to be repugnant to the Constitution of the United States as impairing the obligation of the contract. To this the court said:

"That the act in question is not repugnant to the Constitution, as impairing the obligation of a contract, is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that state to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it can not be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself

behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in Satterlee v. Matthewson, 2 Pet. 380, and, in substance, in Watson v. Mercer, 8 Pet. 88, that 'it is not easy to perceive how a law, which gives validity to a void contract, can be said to impair the obligation of that contract.'"

In Ewell v. Daggs, 108 U. S. 143-151, a statute which declared all contracts voidable for usury was repealed. It was held that the repeal of the statute deprived the debtor of the statutory defense, and was valid as not impairing the obligation of the contract. Touching the objection to the repeal of such statutes as depriving existing contracts of a statutory defense, the court said :

"Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contracts is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives under such circumstances, as long as it remains *in fieri*, and not realized by having passed into completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere to the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsmouth, 107 U. S. 568; and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, Ib. 97; Trustees v. McCaughy, 2 Ohio State, 152; Satterlee v. Matthewson, 16 S. & R. 169; S. C. in error; 2 Pet. 380; Watson v. Mercer, 8 Pet. 88. The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to in-

sist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitations, 378, and cases cited."

There was no error in sustaining the demurrer to the plaintiff's declaration, and the judgment is accordingly affirmed.

Exhibit C.

IN THE CIRCUIT COURT OF THE UNITED STATES

DISTRICT OF WASHINGTON—NORTHERN DIVISION.

CAROLINE L. HATHAWAY and HORACE C. HATHAWAY, a minor,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Defendant.

Opinion.
Filed Jan. 22, 1900.

GEORGE H. DURHAM,
R. W. EMMONS,
V. H. FABEN,
For Plaintiffs.

STRUVE, ALLEN,
HUGHES & MCMICKEN,
For Defendant.

HANFORD, District Judge:

This is an action by the beneficiaries named in a life insurance policy issued by the defendant. By a written stipulation, a jury was waived and the case had been tried and submitted upon the pleadings, evidence and arguments, and upon due consideration I find that the policy was issued by the defendant at its office in the

city of New York on the 26th day of January, 1892, insuring the life of Homer M. Hathaway of Pomeroy, in this State, for the sum of $3,000, in favor of his wife and son, who are the plaintiffs in this action. The contract is a New York contract, to be performed in the State of New York, and as to all the rights and liabilities of the parties, the law of the State of New York must govern. The policy declares that, The Mutual Life Insurance Company of New York, will pay at its home office in the City of New York unto Caroline L. Hathaway and Horace C. Hathaway, son of Homer M. Hathaway, their executors, administrators or assigns, Three thousand Dollars, upon acceptance of satisfactory proofs at its home office of the death of said Homer M. Hathaway, during the continuance of the policy, upon specified conditions, and subject to the provisions, requirements and benefits stated on the back of the policy.

The annual premium of one hundred and thirteen dollars and ten cents was required to be paid on the delivery of the policy, and thereafter to the company, at its home office in the City of New York, on the 26th day of January of every year during the continuance of the contract, until premiums for twenty full years should be fully paid to said company.

This contract is not an assurance for a single year with a provision for renewal from year to year by paying the annual premiums, but it is the kind of a policy which the Supreme Court of the United States in the case of New York Life Insurance Co. *v.* Statham *et al.*, 93 U. S., 24-37, declared to be "an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums". When the contract was made a statute of New York, viz: Chapter 321 of the Laws of New York for the year 1877, prescribed that no life insurance company doing

business in the State of New York should have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a prescribed notice should first be given in a prescribed manner, and that payment made within the time limited by such notice should be taken to be in full compliance with the requirements of the policy in respect to the payment of the premium or interest, notwithstanding any contrary stipulation contained in the policy ; and further providing that "No such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice". In the year 1892 there was a complete revision of the insurance law of the State of New York, and the new statute contained a substitute for the section in the law of 1877, prescribing the notice to be given as a pre-requisite to the forfeiture of a policy for non-payment of premiums. That section of the law of 1892, is by its terms applicable only to policies subsequently issued or renewed. By another section, chapter 321 of the laws of 1877, is declared to be repealed ; another section contains the following saving clause :

"The repeal of a law or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to Oct. 1, 1892, under or by virtue of the laws so repealed, but the same shall be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed."

Another section provides that the provisions of the new laws as far as they are substantially the same as the laws existing on Sept. 30, 1892, shall be construed as a continuation of such laws, modified or amended according to the language employed, and not as new enactments.

It is my opinion that the rights of the parties under the policy of insurance in suit were not affected or changed by the new legislation of 1892. Conceding that the statute of 1877 prescribing the notice to be given was repealed, still there was no interval of time intervening after the repeal of that law, and before the substituted section became effective within which the insurance company could have claimed a forfeiture of the policy for non-payment of the premium, and under the law of 1892 the policy could not be forfeited for non-payment of the premium until thirty days after the mailing of the prescribed notice. In the vear 1897, the law was again amended and Section 92 of the law of 1892 which saves life insurance policies from forfeiture for non-payment of premiums, unless the prescribed notice shall have been given, was reenacted, but with such a change of phraseology as to change the effect so as to only save policies from forfeiture for a period of one year after a premium has been due and unpaid, and with an additional provision barring actions on policies after the lapse of one year from the date of a default in the payment of any premium.

No premiums on the policy in suit have ever been paid, except the first annual premium which was paid at the time the policy was delivered, and the statutory notice was never given. Under the statutes of New York, in force prior to the 8th day of April, 1897, the policy was kept alive, notwithstanding the non-payment of the premium by the mere failure of the insurance company to proceed in the manner prescribed by the statute, to declare a forfeiture. The sole question to be decided in the case, is whether the amendment of the law of 1892 by the act of 1897, had the effect to terminate the contract between the parties immediately, and to bar an action upon the policy after the death of the insured, which occurred subsequent to the date of said statute.

The plaintiffs make strenuous objections to consideration of the statute of 1897, on the ground that the same has not been pleaded, but I consider the objections to be without merit, for two reasons. In the first place, this is a court of the United States, and it is required to have judicial knowledge of the general laws of the different states, which affect the rights of litigants. The defendant issued the policy in suit for the gain expected by receipt of the annual premiums to be paid by the insured; by failure to pay the premiums and by the express provisions of the contract, the defendant would be absolved from liability, but for the statute laws of the State of New York, and this Court cannot enforce a right based entirely upon the New York statutes and at the same time ignore those statutes. In the second place, the statutes of 1877 and 1892, upon which the plaintiffs rely, were not pleaded by the plaintiffs in their complaint, but are set up as affirmative matter in their reply. Now, by pleading those statutes in the reply, the plaintiffs have tendered an issue which, according to the practice under the Code, cannot, be met by further pleading on the part of the defendant, except by a demurrer; but an issue of fact arises, and the defendant may controvert the allegations or avoid the effect thereof according to the truth, either by showing that the statutes which the plaintiffs have pleaded in their reply never existed, or that they have been repealed or amended without filing any rejoinder to the reply.

The act of 1897 permits life insurance companies doing business in the State of New York to forfeit their policies for non-payment of the premiums, and without giving the prescribed notice, but only after the lapse of one year from the date on which the unpaid premiums become due and payable, and bars an action upon a forfeited policy unless it be commenced within one year from the date of de-

fault in the payment of the premium for which the forfeiture is claimed. There is no express declaration in the statute making it applicable to policies which were issued prior to the amendment, and there is nothing to indicate an intention of the Legislature to make the new law retroactive; on the contrary, the statute refers to "any policy hereafter issued or renewed." The questions involved in the decision of this Court and of the Circuit Court of Appeals for the 9th Circuit, in the case of Phinney *v.* Insurance Co., 67 Fed. Rep., 493; Equitable Life Assurance Society *v.* Trimble, 83 Fed. Rep., 85; New York Life Insurance Co. *v.* Dingley, 93 Fed. Rep., 153, and Mutual Life Insurance Co. *v.* Hill, 97 Fed. Rep., 263, are entirely different from the main question decided in the case of Rosenplanter *v.* Provident S. L. A. Society, 91 Fed. Rep., 728, S. C., 96 Fed. Rep., 721. I feel entirely free to concur in the opinions in the latter case, and I assent to the general proposition that, existing rights which do not rest upon agreements of the parties nor upon any consideration of value received, but only hang upon arbitrary provisions of paternal statutes, may be cut off at any time by act of the Legislature which created them without impairing the obligations of contracts. But to cut off existing rights the act must contain explicit declarations of its purpose to cut them off or its provisions must necessarily cut them, as would be the case where the statute upon which they depend is repealed, without a saving clause. The courts will not presume that a new statute was intended to cut off any existing right when there is no express declaration of such intention, for the reason that it is contrary to the policy of our government to construe statutes so as to make them operate retroactively. In the Rosenplanter case the policy under consideration was a term policy, and expired by its own limitations, unless it

was renewed by the omission of the Insurance Co. to proceed according to the provisions of the act of 1877, to effect its forfeiture. It was not kept alive by the statute of 1892, because it belonged to the excepted class, and it was not protected by the act of 1877 after the repeal of that act. The policy in suit was not issued or renewed after the statute of 1897 was passed, and, therefore, it does not come within the purview of that statute, as it is not a policy which had to be renewed periodically in order to keep it alive there was not even a constructive renewal of it, by force of the statute against forfeiture.

I direct that findings be made in accordance with this opinion, and a judgment will be entered thereon in favor of the plaintiffs for the amount of the policy, with interest, after deducting all unpaid premiums with interest, to be computed at the New York rate.

Exhibit D.

SUPREME COURT,

KINGS COUNTY.

PHILIP SCHUELL,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Decision.

The above-entitled action having been tried before me at a Special Term (Trials) of this Court, held at the County Court House, in the City of New York, Borough or Brooklyn, County of Kings, on November 27th, 1899.

After hearing the proofs and allegations of the respective parties, I now make and file the following decision, stating concisely the grounds upon which the issues have been decided herein.

I find that on the 12th day of March, 1896, the defendant issued its policy for $10,000 by which it insured James Thomas Lentzy and agreed to pay Grace and Katrice Lentzy on the death of the assured, the sum of $10,000.

The premiums due on the 12th day of March, 1896, and 1897, were paid. The premiums payable on the 12th March, 1898, were not paid. The statutory premium notice was duly mailed to the assured, James T. Lentzy, on the 9th day of February, 1898, thirty days before March 12th, the day on which the premium was payable.

On the 13th of January, 1899, Lentzy died.

This action was commenced on the 5th day of June, 1899.

I further decide that the premium notice mailed to James T. Lentzy by the defendant on February 9th, 1898, was a compliance with Chapter 218 of the Laws of 1897, the provisions of which controlled this policy at all times subsequently to April 8th, 1897, the date of the passage of said Act, and that failure to pay the premium due and payable on March 12th, 1898, worked a forfeiture of the policy.

And I further decide that the statutory premium notice provided for in the said Law of 1897 need not be given after the due date of the premium named in the policy.

And I further decide that the amendment of Chapter 690 of the Laws of 1892 by Chapter 218 of the Laws of 1897 did not give the assured one year after March 12th, 1898, the date of default in the payment of the premium, within which to make such payment.

And I therefore decide that the complaint of the plaintiff should be dismissed upon the merits, and direct judgment accordingly for the defendant, with costs.

Dated New York, Feb. 15th, 1900.

MARTIN J. KEOGH,
J. S. C.

A copy,
PETER B. HUBERTY,
[SEAL.] Clerk.

Exhibit E.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

FLORA B. ROSSON,
Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

Opinion.

The complaint shows that Roland L. Rosson, on February 3, 1898, applied to an agent of the defendant at Los Angeles for life insurance in defendant corporation, which insurance was to be made payable to the plaintiff, his wife. The written application is set out in the complaint is dated February 3, 1898, and provided that the application and the policy thereby applied for, taken together, shall constitute the contract between the parties, and "that this contract shall not take effect until the first premium has been paid during my good health." The application was sent to defendant's home office in New York by the agent. The defendant accepted the application, and on February 21, 1898, a policy in the sum of $10,000, wherein plaintiff was named as beneficiary, was signed in New York by the proper officers of defendant, and then and there mailed by them to the agent at Los Angeles.

On March 12, 1898, at Los Angeles, the agent delivered the policy to Rosson who then and there paid to the agent

the sum of $46. The policy applied for and delivered was what is called by defendant, "a yearly renewable term policy," and provided for an annually increasing premium on the basis of a table of rates printed on the policy. But at the request of Rosson it was provided in this policy "that in lieu of premiums payable annually as provided in said policy, there shall be substituted premiums payable quarterly on the third days of February, May, August and November of each year, the quarterly premiums for the year from February 3, 1898, to February 3, 1899, being forty-six dollars, increasing on the last-mentioned date and annually thereafter on the basis of the table of rates printed on the reverse of this sheet. * * * That the insurance year upon the said policy shall commence on the third day of February." No further payments for or on account of premiums were ever made. But on May 12, 1898, Rosson died at Los Angeles.

The complaint also sets out the present statute law of New York, which provides that life insurance companies doing business in that State shall not, within one year after default in payment of a premium, declare forfeited or lapsed, an insurance policy unless a notice of described contents shall, within specified times, "have been duly addressed and mailed to the person whose life is insured at his or her last known post office address in this State," etc. The complaint then alleges that a notice, which is set out in full, was mailed in New York on April 15, 1898, to Rosson, at Los Angeles; and further alleges that no other or different notice was ever mailed or given to Rosson by defendant. The complaint contains also allegations relating to the manner of filling out the application, as to the post office address of Rosson, etc.

Defendant has moved that these allegations relating to the statutes of New York, and to the manner of filling out the application, etc., be stricken out on the ground that

same are irrelevant. Defendant has also demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

If the provisions of the New York statutes relate as well to the policy holders who do not reside and who have no postoffice address in that State as to resident policyholders, then the motion to strike out should be denied. But if the statute relates only to policyholders who are residents of, and who have a post office address in New York, then the motion should be granted.

I think the motion should be granted.

Under the circumstances of this case, the final acts of the execution of the contract of insurance were done in California. The policy was delivered and the first premium was paid here. The contract did not take effect until the first premium was paid. Such being the facts, and the application having been made here, it must be held that the contract made in this case is a California and not a New York contract.

Equitable Life Society *v.* Clements, 140 U. S., 226.
Curtis *v.* Aetna Ins. Co., 90 Cal., 245.
Cravens *vs.* New York Life, 50 S. W., 519.
Hicks *v.* National Life Ins. Co., 60 Fed., 690.
Equitable Life *v.* Wenning, 58 Fed., 541.
Insurance Co. *v.* Elliott, 5 Fed., 225.
Horton *v.* New York Life, 52 S. W., 356.
Stevens *v.* Fertilizer Co., 41 Atl., 116.
Ivey *v.* Kern Co., L. Co., 115 Cal., 201.
Yore *v.* Bankers Ass'n, 88 Cal., 609.

The rule to be derived from these cases is that the acceptance of an application and the signing of a policy in one State amounts to but a partial execution of the contract in such State, when, as in the case at bar, the policy,

after being signed, is mailed to an agent, of the insurer in another State there to be delivered to the assured, and not to be in effect until the first premium has been paid during his good health. Payment of the premium during the good health of the assured, and delivery of the contract to him, are conditions precedent to and are the final acts in the execution of the contract. Hence, it must be held here that this contract was made at Los Angeles, California, and took effect on March 12, 1898, the day that the first premium was paid and the policy delivered.

It appearing from the complaint that the assured resided at Los Angeles at all of the times above mentioned until his death; that he had no post-office address in the State of New York, it must follow, from a reasonable construction of the New York statute, that the defendant was not required to give to the assured the notice required by that statute in order to claim a forfeiture of the policy for a non-payment of premium.

As authority for the proposition that the above-mentioned N. Y. Statute is applicable to this case, plaintiff's counsel refers to Griffith *v.* Life Insurance Co. (101 Cal., 640). Since that decision was rendered the statute of New York has been amended. It did not then provide, as it does now, that the notice shall be mailed to the insured "at his or her last known post-office address in this State." The phrase "*in this State*," was inserted by amendment of the statute in 1897. And though the statute may be construed as "a limitation on the power" of a New York Life insurance company to declare forfeitures, still, under the amendment, that limitation relates to policy-holders having post-office addresses in that State.

The cases of Equitable Life, etc., *v.* Nixon and Trimble (81 Fed., 796, and 83 Fed., 85), are also cited to sustain the contention that the contract made in this case is a New York contract, and that the statutes of that State

are applicable. But these decisions, also, are based upon the statute as it stood before the amendment. In each of these cases the premium accompanied the application, and, in each case, the contract of assurance was complete, and the insurance in force, when the application and the premium were accepted, and the policy signed in New York.

But there is another matter which fixes the place of contract at Los Angeles. The application states that the quarterly premiums for the first year should be $45.95. The policy fixed it $46.00. The policy delivered at Los Angeles differed, in this respect, from the application. Therefore, this policy had to be accepted by the assured. This was done at Los Angeles. For this reason alone, it could not be contended successfully that the contract was executed in New York.

The statute provides that no life insurance corporation doing business in New York shall declare any policy lapsed or forfeited by reason of non-payment when due of any premium, unless a written or printed notice stating, etc., "shall have been duly addressed and mailed to the person whose life is insured * * * at his or her last known post office address *in this State* * * * at least fifteen and not more than forty-five days prior to the day when the same is payable * * * and no policy shall in any case be forfeited * * * * * * * until the expiration of such notice." It must be epparent that this provision was intended by the legislature of New York for the benefit of policy-holders residing and having a post office address in that State. Counsel for defendant have thoroughly briefed the questions to be considered in the proper construction of this statute. But it seems to me that the provisions of the statute itself clearly indicate that its benefits were intended for residents of New York; that the legislature was enacting a law for the benefit of

persons within its jurisdiction. The authorities cited fully sustain this conclsuion, and no discussion of them seems necessary. They are:

Sutherland, Stat. Construction, Secs. 218, 238.
Burr *v.* Dana, 22 Cal., 11.
DcDougal *v.* Provident Life Ass'n., 135 N. Y., 556.
Merrill *v.* Railroad, 63 N. H., 259.
Whitford *v.* Panama R. R. Co., 23 N.Y., 465.
State *v.* Fire Ins. Co., 51 S. W., 635.
Queen *v.* Lightfoot, 6 Ell. & Bl., 822.
Bishop on Written Laws, Sec. 141.
Needham *v.* Grand Trunk R. R. Co., 38 Vt., 307.
State *v.* P. & C. R. R. Co., 45 Mo., 41.
South Yuba Dam *v.* Rosa, 80 Cal., 333.
Felton *v.* West, 102 Cal., 266.

Holding, as I do, that the above mentioned provisions of the law of New York do not apply to policy holders in defendant corporation, who reside and have their post office addresses in this State, the motion to strike out parts of the complaint must be granted.

December 28, 1899.

D. K. TRASK,
Judge.

(Endorsed): 32673—Rasson *v.* Equitable Life Ass'n. Soc.—Opinion filed Dec. 29, 1899.—C. W. Bell, Clerk, by A. M. McPherron, Deputy.

FILED
MAR 20 1900
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 452, 453, 454, 455.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

COHEN.

SAME *vs.* HILL.

SAME *vs.* SEARS, EXECUTRIX, &c.

SAME *vs.* ALLEN, ADMINISTRATOR, &c.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR AND PETITIONER, FILED BY LEAVE OF COURT.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
For Mutual Life Insurance Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-20-1900

IN THE

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SAME *vs.* ALLEN, ADMINISTRATOR, &C.

Supplemental Brief of Plaintiff in Error and Petitioner, Filed by Leave of Court.

Should the court uphold either Point II, III, IV, V, VI, or VII of the brief in the Phinney case (No. 12), the above causes will be disposed of with like result as in that case, except that Point III does not apply to the Hill case, as the application for that policy contained the provision that the contract of insurance when made should be held and con-

strued at all times and places to have been made in the city of New York.

It is desired to add here a few considerations pertinent to these cases and applicable to the above points, and also to present some views on questions arising under the act of 1897 applicable to the Cohen and Sears cases and not fully elaborated in the main Cohen brief.

The following summary is made for the convenience of the court:

Hill Case.

The date of the Hill policy is April 29, 1886; amount, $20,000. The first annual premium was paid upon delivery of policy. The second, third, and fourth annual premiums were not paid. Hill, the insured, died December 4, 1890. The beneficiaries were the wife, if living; if not, such of the children as might be living upon the death of the insured. Suit was commenced October 19, 1895.

Sears Case.

Date of policy, May 18, 1891; amount, $10,000; payable to executors, administrators, or assigns.

The annual premium due May 18, 1892, was paid, but the third, fourth, fifth, sixth, and seventh annual premiums were not paid. Sears, the insured, died March 30, 1898. Suit was commenced September 28, 1898.

Allen Case.

Date of policies (2), February 18, 1893; amount, $2,500 each; payable to executors, administrators, or assigns.

The first annual premium was paid. The second, third, fourth, and fifth were not paid. Stewart, the insured, died July 9, 1897. Suit was commenced December 28, 1897.

Cohen Case.

Policy dated June 10, 1888; amount, semi-endowment of $1,500 to himself if living at the expiration of ten years; in case of death before that time, $3,000 payable to wife, Tine Cohen.

Premiums were paid to June, 1892. All subsequent premiums were not paid. Death occurred September 21, 1897. Suit was commenced November 29, 1898.

POINT I.

The widow of Cohen and the children of Hill, beneficiaries in the respective policies, not having paid or caused the premiums overdue to be paid, are concluded by the conduct, statements, and omissions of the insured.

It is to be remembered that in each of these two cases the insured himself made the application for the insurance; the contract was between him and the company; the premiums, so far as paid, were paid by him alone; to him was delivered the policy, and, for aught in the record to the contrary, in his possession it remained.

Under such state of facts, we think the following conclusions must be accepted:

a. That there was no obligation on the part of the insured to pay premiums longer than he wished, and that the beneficiaries had no power or authority to require the insured to make payment.

b. The insurance company by the contract dealt solely with the insured, and was required to give notice to him alone. If the insured failed or refused to make a payment

at the due dates, or for thirty days after notice had been served, the contract was terminated.

c. The inability of the insured to pay, his refusal or his neglect to pay, operated to terminate the contract.

It is wholly immaterial who the beneficiary may be, whether third person not wife or children, or wife or children, so far as the question of notice is concerned. We are dealing only with the question of statutory notice to the insured. The wife or children, beneficiaries, cannot recover when the premiums have not been paid. It is not a question of the company preventing them from paying or preventing any one in their behalf from paying. The company, under the statute, owed no obligation to *them*. The obligation, if any, was to Cohen and to Hill alone. Such obligation, if any, was destroyed, the company claims, by the acts of the insured. If so, it follows that Cohen and Hill were without excuse for non-performance, and their non-performance had its full effect, namely, cancellation of the policies.

The sole excuse the wife of Cohen or the children of Hill urge for non-payment of premiums is that notice was not served on Cohen or Hill; but this failure to serve notice did not in any way prevent the wife or the children from paying or causing the premiums to be paid. In the case of Wheeler *vs.* The Connecticut Mutual Life Insurance Company, 82 N. Y. Appeals, 543, the policies had been assigned by Vose to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated by "his insanity, a competent person could have been ap- "pointed in his place; and hence his insanity was not "necessarily an insuperable obstacle to their performance "of the condition of the policy, and they were not relieved "thereby" (p. 550).

We submit, the insured stands as principal and is the only person with whom the insurance company had to deal; but if it should be contended that the beneficiaries are the principals and the insured their agent in matters relating to premiums, then the insured's relation to the matter is that of a general agent clothed with full power; and whether the beneficiary is a person of capacity or laboring under incapacity, in claiming the benefits of the policy he must be bound by the conduct and representations of his general agent. If the insured, as general agent, made such representations and was guilty of such conduct as would preclude him from recovering on the expiration of a term policy payable to himself, his beneficiary, whether over or under age, cannot recover upon like policy, for such representations and conduct will bind him also, and this, we think, in the nature of things, must be the universal rule, regardless of the capacity or incapacity of the principal. If a guardian or other person represents the infant beneficiary in asserting a claim to the insurance under such circumstances, he steps in the shoes of the insured.

In Klein *vs.* Insurance Company, 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was that if the stipulated premium should not be paid on or before a certain day the policy should cease and determine. A semi-annual premium due in March, 1871, was not paid. The wife alleged as a ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business whatever, and for that reason failed to pay the premium when it was due. The bill was dismissed in the lower court, and on appeal this court affirmed the decree.

Mr. Justice Woods, in the opinion (page 92), states:

"She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect of this contract of insurance, was her agent, in not informing her about the insurance on his life and the term of the policy. The bill is therefore an effort by her to obtain relief in equity against the appellee from the consequence of neglect of her own agent."

Knickerbocker Life Insurance Co. *vs.* Pendleton and others, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel H. Pendleton for the benefit of the plaintiffs as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted on account of want of funds in the hands of the drawee.

In the opinion, at page 708, Mr. Justice Bradley says:

"The drawer (Pendleton) who took entire charge of the policy for his children, put its existence on the condition of the payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawee, or that they would pay it, whether in funds or not."

In Miles *vs.* Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued, and he paid with his own money all of

the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. This was agreed to, and a receipt was presented by him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid-up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife, the company set up non-payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider *vs.* U. S. Life Insurance Co., 123 N. Y., 109, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'Brien, J., at page 114, it is stated:

"The husband had the possession of the policy, and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case."

See also Manhattan Life Ins. Co. *vs.* Smith, 44 Ohio State, 156.

In Baker *vs.* The Union Mutual Life Ins. Co., 43 N. Y. Appeals, 283, the court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own (Elwell *vs.* Chamberlain, 31 N. Y., 611: Bennett *vs.* Judson, 21 *id.*, 238). If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but cannot affirm in part and repudiate in part, take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al. vs.* New York Life Ins. Co, 102 N.Y., 143, a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. *Held*, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender, and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

Finch, J. (p. 150):

"He (the insured), therefore, in procuring the policies to be made, in paying the premiums, in receiving and acting upon notices and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting and representing the assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes *vs.* Gilman, 138 N. Y., 369, 381, 382, is to like effect.

In Mechem on Agency, section 775, the author states the rule as follows:

"Hence it is a rule of universal application, whether the principal be disclosed or not at the time of entering into the contract, that the principal is affected by, and is subject to, every defense which the other party may have, based upon such fraud, imposition, misrepresentation, concealment or other misconduct of the agent as is, either by a prior authorization or a subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent."

POINT II.

The answers in all of these cases set up facts which estop the insured and all others interested from recovering upon the policies.

Each of these answers sets up acts on the part of the insured indicating an intention to abandon the policy of insurance, with the practical result of rescission. Each of these answers sets up statements on the part of the insured by which he refused to pay the premiums, and also the fact that subsequent to such refusal the insured did not pay the premiums for a number of years prior to his death. It is obvious that with respect to any one of the annual premiums remaining unpaid the insurance company might have sent the notice provided for in the statute and forever have put an end to the possibility of a claim that the policy was a subsisting contract. Not sending these notices was conduct prejudicial to the interests of the insurance company, which consists of living members or policy-holders who faithfully perform their part and duly

and punctually pay their premiums. Refraining from sending the notices was, as is pleaded in all of these cases, induced by the conduct and acts of the insured, and, as is also pleaded, the company in not sending the notices relied upon the conduct of the insured in refusing to pay his premiums and in not paying his premiums. Whether the facts be looked upon as creating an agreement to abandon or rescind for a sufficient consideration, to wit, the detriment to the company, or as creating an estoppel, a defense is equally well made out by the company in each of these cases.

The policies in the Cohen and Hill cases not being payable solely to the insured, but also to wife or children, are nevertheless to be successfully defended against on the ground of estoppel.

In the Cohen case the widow sues because, although it is an endowment policy payable to Cohen himself in 1905, it became payable to his widow upon his death occurring prior to that date. No added difficulty arises from the fact that these two policies are payable to other persons than the insured as beneficiaries. It is well settled, as shown in Point I, that in all matters connected with the making of the application and the taking out of a policy the insured acts as the agent of the beneficiary, who is bound by the statements and the conduct of the insured. Similarly, for all matters connected with the payment of the premium and the receipt of any notice with respect thereto, the insured must be considered the general agent of the beneficiary. The insured is the person who determines how and when the premium is payable and who is expected to pay the premium and who actually does pay the premium. The scheme of the contract makes no provision for payment of the premium by anybody but the insured. The statutes with regard to the sending of premium notices relate primarily to the sending of notices to the insured—not to the beneficiary.

It has been held that the insured is under no duty to the beneficiary to pay the premiums and keep them up. Remembering that the statute contains no provision for sending notice to the beneficiary and confers no right of forfeiture upon the company if the notice be sent to the beneficiary, it seems clear that in all matters connected with that notice the insured must be regarded as the representative and agent of the beneficiary. The statute is designed not to jog the memory of the beneficiary, not to guard against the negligence or want of business promptness and attention of the beneficiary, but to deal in these matters simply with the insured. When the insured, as in these cases, refuses to pay a premium, elects and makes known his election to the company to have the policy lapse and forfeited, and subsequently for many years does not pay any premiums, the company is lulled into security and the belief that the insured has abandoned the policy, and that the sending of notices is unnecessary and would merely call attention to an act which the insured had long since determined he would not perform.

POINT III.

The time limited in the premium-notice statutes for sending the prescribed notices clearly indicates that such notices were required to be sent only to persons having addresses within the boundaries of the State of New York.

The necessary limitation of the scope and effect of the premium-notice laws to the geographical boundaries of the State of New York is shown by the circumstance that the length of time provided in these statutes for the giving of notice to the insured precludes the possibility that the legislature could have contemplated that these notices would be

sent to others than those who were to receive their mail-matter within the limits of the State of New York. All of these statutes make such provision with regard to the mailing of the notice that the insured will always suffer forfeiture of his policy at least at the end of thirty days from the date of the mailing of the notice. Thirty days is the obligatory limit of statutory forewarning. In view of the circumstance that long prior to 1876 insurance companies of the State of New York had been transacting business not merely in the most remote portions of the United States, but also in foreign countries, it is obvious that there would be many insured in these companies whose distance from the home office would be such that it would be physically impossible for a notice to be mailed and received by them in time for the insured to make remittance of the premium and save a forfeiture. It must be considered that the legislature had this information in its possession when the acts were passed. The logical conclusion is that the legislature could not have intended to require that the notice be sent to those who had post-office addresses outside of the State of New York, because in many instances the sending of such notices would be productive of no useful or practical result. The declaratory act of 1897, expressly limiting the mailing of notices to those having post office addresses within the State of New York, proves that this view is the correct view, and the argument on page 17 of the Cohen brief on this point is thus rendered conclusive.

It was not intended that the statutory notice should be mailed to persons outside the State of New York. The statute is one of public policy, external to the contract. By agreement of the parties it cannot be drawn into the contract nor excluded from it. It presupposes a contract between the parties such as they see fit to make. It in no manner limits their contracting rights. It is not a statute of contract or a contract obligation. It comes by way of relief, after a contract has been made and after it has been

violated, to afford protection, in the interest of the public, to a certain class of persons against the consequences resulting from such violation of contract, or rather, as a matter of public policy, it prevents one of the parties to the contract from making defense of the violation of the contract by the other party. It shuts the doors of the courts of New York against the insurance company in making defense of non-payment of premium according to the stipulation of the contract. The original statute, being enacted in 1876 with the object of protecting insured persons against their own negligence and improvidence, provided a time of notice that must have been deemed adequate to accomplish the purpose the legislature had in mind, which was to remind the neglectful policy-holder of the due date of his premium, and after bringing him information upon the subject, of also affording him the opportunity of making payment at the home office of the company in the State of New York. Such a notice, if confined to the State of New York, would accomplish the purpose the legislature had in mind. If at the time of enactment of the law it extended indefinitely beyond that State, it was of little or no value to the policy-holder. The construction of this public-policy statute for which we contend is, that the notice was to be mailed to persons in the State of New York. If this is not the correct construction, then the legislature intended to reach out, with a thirty-days' notice, to the limit of mail communication, whether upon this continent or wheresoever treaty arrangements extended the mail facilities of the United States. The fact that the affidavit of an agent or employé of the insurance company is by the statute made *prima facie* evidence of the mailing of the notice furnishes another strong reason for the contention that the notice applied only within the State. Such rule of evidence could not be established for courts of other States and jurisdictions.

POINT IV.

All questions arising under the act of 1897 are open to discussion in this court.

The case arose in the court of first instance upon a general demurrer. Notwithstanding that neither the complaint nor the answer referred to any of the premium-notice acts, the United States court was competent to take judicial notice of these public statutes. Every question arising, therefore, on any of the premium-notice statutes was open to discussion in the court below, assuming that the omission from the pleadings did not result in leaving the original plaintiff with the cause of action defectively pleaded. On the appeal to the circuit court of appeals and in this court the only assignment of errors necessary was a general statement that the court erred in giving judgment for the original plaintiff upon the demurrer to the answer. The records of such cases as these necessarily fail to show, and it is not necessary that they should show, what questions were *discussed* in the court of first instance or at the circuit court of appeals. Where a cause is presented upon a general demurrer, the record cannot show what questions were *discussed*, and it therefore must be assumed that every question that could have been discussed was taken up, and no such question can be excluded from the consideration of any court at any stage of the case. The defendants in error cannot prove to this court, either by assertions of counsel, or by briefs of opposing counsel filed in the court below, or by the opinions of the court, what the questions were that were discussed or omitted in either of the lower courts. This court has repeatedly held that the record, and that alone, can be appealed to for such purposes, and that briefs of counsel and opinions of the courts form no part of the record. Counsel are not prohibited from discussing

orally propositions that are not set forth in their briefs, nor are courts presumed to be uninfluenced in their decisions by questions proper in the case which may not be taken up for discussion in the prevailing opinion.

The rule that requires the court to take judicial notice of the statutes of New York of 1877 and 1892 equally applies to that of 1897. Counsel cannot preclude this tribunal from applying a general statute of which it must take judicial notice to the case under review.

POINT V.

The legislature of the State of New York, with respect to existing policies, had power under the act of 1897 to withdraw the provision with respect to notice, to fix a period of time after which, with or without notice, the company could declare a forfeiture, and to provide that action should not be brought within a year from a default in the payment of premiums.

A.

The original act of 1876 was held to affect prior existing policies. This was never questioned by counsel or by the courts, notwithstanding it placed upon the companies an obstruction to the exercise of their contract right to forfeit existing policies for non-payment of premiums upon the due date.

B.

The provisions of the contracts affected and of the premium-notice statutes establish the proposition that these laws are a governmental regulation and do not form part of the contract, so as to confer any vested right upon the

holder of a policy made subsequent to the enactment of any of them; nor does the act of 1897 impair the obligation of any contract of the holder of a prior existing policy. None of these statutes prescribes the form of the contract or prohibits the agreement which is entered upon by all of these policies in question by which, upon failure to pay the premium upon the due date, the policy-holder forfeits, first, any accumulated reserve; and, second, his right to continuing or future insurance. The statutes (of 1876, 1877, and 1892) merely operate upon the parties after the contract has been executed and delivered, and regulate the form or method of procedure of the company in carrying out its rights under the contract. It never has been pretended that the effect of any of these statutes is to absolve the policy-holder from the payment of premiums; and, indeed, in no just sense can it be said that, even with the protection of the statute, the policy-holder is otherwise than in default under his contract when he fails to pay his premium upon the day fixed. The scope, object, and effect of the statute is, merely as a governmental regulation and as a matter of public policy, to interpose an obstacle in the way of the company insisting upon its rights of forfeiture given by the terms of the contract until it shall have given the prescribed notice. This notice is additional to that which the policy-holder already has through the possession of his policy, whose terms prescribe the amount of premium due, the day upon which it falls due, and the place where it may be paid. This second and additional notice prescribed by the statute is secured to the policy-holder only by the statute, and there is no rule of common law which renders it necessary that the statutory notice or any similar notice should be given him before his contract with regard to forfeiture takes full force and effect. We have no case here like that of requiring process to be served before judgment can be taken in an action at law. This is not a question of due process of law. There is no necessity that the legislature should provide for the statutory

premium notice or any similar notice. It is a work of supererogation, an additional safeguard from motives of public policy thrown around the interests of the policy-holder, which in no sense becomes part of his contract, so that the legislature cannot subsequently to the making of the contract withdraw the provision for giving notice. In none of these cases have the parties imported the statute into the policy. The form of the contract evinces the intention of the parties to disregard the statute, to contract in spite of it, and to provide that the policy shall be forfeited if the premium be not paid upon the due date. The provision in the policy waiving any statutory notice of the due date of the premium, or any notice other than that contained in the policy itself, shows the intention of the parties to get away from the statutes as much as possible, and precludes any claim on the part of the policy-holder that he is not satisfied with a repeal of the statute as to his existing policy. Nor is this view changed by any language contained in the policy or application that they are subject to the laws of the State of New York and are to be construed by such laws. Of course, the policy must necessarily be subject to the laws of the State of New York, if it is a New York policy, and the statement in the application that it is so subject is nothing more than an expression of a legal fact and not of an intention on the part of the parties to make a contract in the terms of the statute. The premium-notice statutes are purely remedial. They are passed by the State in the exercise of its police power and of its right to protect the negligent, careless, and unbusinesslike from the disastrous effects of their unreasoning conduct. Such statutes have always been held to be repealable and to confer no vested right. They are passed from motives of public policy, with no regard for individual interests or the rights of any particular person, and are not considered as conferring rights upon any individual. The repeal of premium-notice statutes rests upon

the same basis as the repeal of any other law which has obstructed the carrying out of a contract morally valid but legally invalid. Such repealing statutes are not considered as impairing the obligation of a contract, but as removing an obstruction to the performance of a contract. The premium-notice statutes never touch the obligation of the contracts, but simply deal with the mode and method by which the company may proceed to forfeit the contract according to its terms. The only effect, therefore, that an amendment or repeal of a premium-notice statute has, is to leave the contract operative in a particular with respect to which it was formerly obstructed. These views have been accepted by the circuit court of the United States for the sixth district, both in the first instance and in the court of appeals, in the case of Rosenplanter *vs.* Provident Life and Savings Assurance Society of New York. Copies of the opinions of the court are annexed to our brief in the Cohen case. In the circuit court of the United States for the ninth district the general proposition with regard to the power of the legislature in this behalf is accepted in the case of Hathaway *vs.* The Mutual Life Insurance Company, a copy of which opinion is annexed to our brief in the Cohen case; but the Rosenplanter case is distinguished, as we think, fallaciously, as has been pointed out in our Cohen brief. The supreme court of the State of New York and the superior court of the State of California have also upheld the power of the legislature as here claimed.

It is well settled that the legislature can withdraw the defense of usury with respect to existing contracts. Retroactive effect is given to laws prohibiting the defense of usury, as such statutes are regarded rather as laws giving force and validity to the obligation of contracts than as impairing such obligation.

Wade on Retroactive Laws, secs. 240, 244, 245, and 246, and cases there cited.

It has been held that an act validating bank notes previously invalid was constitutional and impaired no vested right.

Bleakney *vs.* Farmers' and Mechanics' Bank, 17 Sergeant & Rawle, 64.

Hayes *vs.* Wurts, 4 Sergeant & Rawle, 356.

Trustees Cuyahoga Falls R'y Co. *vs.* McCaughney, 2 Ohio St., 52.

A remedial act permitting an unpaid tax to be paid so as to validate a void contract has been held to be valid.

Phœnix Ins. Co. *vs.* Pollard, 63 Mis., 641.

Remedial acts permitting stamping of unstamped instruments are valid.

Harris *vs.* Rutledge, 19 Ia., 388.

In this case the obligor in a contract claimed a vested right to avail himself of his own default in complying with the law requiring him to affix his stamp to the instrument executed by him. This seems a proposition only less shocking than those involved in these cases—that an insured after neglecting to comply with his contract for years can nevertheless, by reason of a technical omission to send an unnecessary and useless notice, mulct the company. The contract of insurance cannot be read over without a recognition of the moral obligation on the part of the insured not to claim anything under the policy unless he has punctually paid his premiums. That moral obligation renders it impossible that he should have any vested right in even a statutory regulation interposed from motives of public policy as an obstruction to the performance of his obligation. There was no moral wrong in the insured entering into the contracts in question; contrariwise, they were morally valid, and could be enforced according to their terms but for the obstructive effect of the

necessity of giving this notice. The insured certainly has no vested right in not performing his contract according to its terms, which, be it observed, was never declared by any statute to be invalid or in any sense prohibited by law. The giving of the notice provided for in these statutes is a mere remedy, and does not cease to be such because it is obstructive to the company and beneficial to the policy-holder. Remedies of necessity belong to the supreme power to prescribe, and their continuance is not the subject of contract between private parties.

Conkey *vs.* Hart, 14 N. Y., 30.
Curtis *vs.* Whitney, 13 Wall., 68.
Cooley on Const. Lim., 2d ed., 361, 362.

There is no good reason why legal impediments to the enforcement of contracts binding upon the conscience may not be removed.

New Orleans *vs.* Clarke, 95 U. S., 644.

That the provision in the policy that it be forfeited if the premiums be not paid upon the due dates is binding upon the conscience of the insured and is a moral obligation is made clear from a consideration of the character of a life-insurance policy. It is a wagering contract. The insurance company bets that the insured will die after the average age, and can make no money out of the transaction unless the insured so dies. The insured bets that he will live less than the average age, and gains nothing unless he so lives. Those who die under the average age are paid their losses by the gains from those who live beyond the average age, who, by their overpayments, produce the funds to pay the losses of those dying early. The scheme of life insurance is therefore totally deranged by a cessation of payment of premiums by an insured for a number of years, with a subsequent restoration of the policy, for the reason that, as the contract is unilateral and the insured cannot be com-

pelled to pay premiums, the matter takes this practical turn: That if the insured has an impaired life and sees that he will die under the average age he will pay up his premiums and have his policy restored; whereas, if he sees that he will live beyond the average age he will not pay up back premiums. This whole matter is most ably elucidated in the case of Statham *vs.* N. Y. Life Insurance Company, 93 U. S., 24. (See point IV, Phinney brief, p. 94.)

POINT VI.

The intention of the legislature in passing the statute of 1897 was to affect existing policies.

Existing policies were embraced in the word "hereafter," where the statute refers to policies "hereafter issued or renewed." This was a perpetuation of the former language and speaks as of the time of the passage of the act of 1876. The word "renewed" in this section in the act of 1899 means precisely what it was held to mean in the original act of 1876. It means an existing policy which is renewable or to be renewed or capable of being renewed by the payment of a premium after the first premium. It must be observed that this act of 1897 is in no sense limited to residents of the State of New York. It affects all policies and holds out to every policy-holder the opportunity of obtaining the benefits of its provisions, provided he has a post-office address within the State of New York. Non-residents, as well as residents, may have such an address. It is obvious that the statute of 1897 effects these results:

(1.) It absolutely repeals all provision as to notice to those who do not have post-office addresses in the State of New York, and as to them it gives power to the company to forfeit the policy within a year from any default when there has been no notice.

(2.) With regard to existing policies where a default has occurred prior to the taking effect of the act of 1897, it gives power to forfeit the policy at the expiration of a year from non-payment of premium, even if no notice has been sent.

(3.) As to policy-holders not having post-office addresses within the State, the company being under no necessity of sending them any notice, and upon showing the proof of notice to those having such addresses, it clearly has the right to forfeit the policy upon any default occurring after the taking effect of the act.

(4.) In any event and with respect to any policy it limits all right of action upon the policy to a year after any default in paying premium.

The Cohen and the Sears policies are clearly forfeited, because in each case the premium for the year preceding the act of 1897 was not paid and more than a year elapsed after such premium became due before the death of the insured. A premium became due after the act of 1897 took effect and was not paid, and no suit was brought upon the policy, either to restore it or to recover upon it, within a year from the non-payment of the premium that fell due after the act of 1897. It is not necessary to repeat here the arguments contained in the fourth point of the Cohen brief, but attention is respectfully requested to them in this connection. If our argument is well founded that the provision about bringing suits within a year is not a statute of limitation strictly, but a limitation upon the right granted by the statute to every policy-holder, then it was not necessary to plead the statute.

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Br. of Warburton for Resp't.

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OCTOBER TERM, 1899.

No. 454

MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

TINE COHEN, DEFENDANT IN ERROR.

Brief Opposing Petition for a Writ of Certiorari.

S. WARBURTON,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-20-'99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No.

MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

TINE COHEN, DEFENDANT IN ERROR.

The points discussed and the reasons given why the application for the writs of certiorari should be denied are fully set forth in the briefs filed in the cases of Ins. Co. *vs.* Hill and Ins. Co. *vs.* Sears, to which we respectfully refer the court and ask it to consider those briefs as the brief in this case. We only wish to say in addition that the two alleged defenses of estoppel and waiver are not made in this. The company does not claim to have served the statutory notice. It does not claim there was any subsequent waiver of the statutory notice. It does not claim Mr. Cohen or the beneficiary ever did or said anything that could be construed a waiver of their rights under the contract. They admit the issuance of the policy and the payment of 7½ years' premiums, and all the facts which make the policy a New York contract. Do not pretend to have served the statutory notice. There is one other point we wish to call to the court's attention.

Mr. Cohen took out his policy on the 10th day of June, 1885, and paid seven and one-half years' premiums, but failed to pay the semi-annual premium on December 10, 1892. It will be noticed the policy is a semi-endowment twenty-year policy. The premiums are very heavy and the reserve is correspondingly large. This reserve, if used to purchase extended insurance under the New York statute, would carry the policy for its full face for at least thirteen years and 130 days, the company still retaining as forfeited all dividends and one-third of the reserve (Flitcraft's Manual Life Insurance, page 1895 Ed., Missouri statutes and New York being practically the same). This would have continued Mr. Cohen's policy of three thousand dollars in full force and effect until about May, 1906, or nine years beyond his death, although having paid his full share of expenses of the company and the company still forfeiting, as it legally may do under the statutes, one-third of the reserve and all the dividends and accumulations on the policy, or Mr. Cohen could have surrendered his policy under the New York statute six months after he had been put in default by service of the statutory notice and received a paid-up policy for over one thousand dollars, payable at his death.

But the company did not serve the notice and the policy was not forfeited, so it was never necessary for Mr. Cohen to surrender the policy and obtain a new one either for paid-up or extended insurance. He could delay surrendering the policy until fully six months after the service of the statutory notice. He had the thirty days after the service of the notice to elect to make further payments and six months after the termination of the thirty days to elect whether he would take paid-up or extended insurance.

The judgment below was for a few dollars over $2,700. The decision of the lower court was right. No rea-

son of any character can be shown why the defendant in error in order to sustain a judgment of $2,700 should, after having litigated the case through the final court, save in exceptional cases, be to the further expense and trouble of litigating it here. The expenses of a trial at home and at San Francisco she was compelled to meet. She is compelled to be at the expense of resisting this application. Shall she be compelled to still go to the additional expense of trying it here? Where will her judgment of $2,700 be if all this additional expense is forced upon her? A large part in the necessary expenses of such protracted litigation.

We believe the decision of the lower court was right, that the application ought to be refused.

Respectfully submitted.

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No. 454, 157

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No. 454.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

TINE COHEN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-14-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 454.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

TINE COHEN, DEFENDANT IN ERROR.

STATEMENT.

The questions in this brief are all considered in either the Sears or Hill brief. In this case there is no question of estoppel. None is even attempted to be plead; nor is there any claim made that Mrs. Cohen is in any manner estopped from asserting her rights under the policy.

On the 10th day of June, 1885, Mr. Cohen took out this policy of insurance. He paid 7½ annual premiums, paying the last one June 10, 1892. Defendant in error commenced her action in the circuit court on the policy. Defendant in error defended on the ground that the policy was forfeited on December 10, 1892, for non-payment of premium. The plaintiff in error demurred to this answer, claiming that the act of 1877 was a part of her contract, and the plaintiff in error had failed to show it had forfeited the

policy according to that law. The plaintiff in error claimed that the defendant in error could not assert any right under the act of 1877 for the following reasons only: That the policy was a Montana contract; that the statute of 1877 had been waived by an express provision of the policy; that under the said statute it was not necessary to send notices to non-residents. This is the sum total of its defense in the circuit court.

It made no other claim. It never referred in any manner to the act of 1897. It never made any claim that the statute of 1877 had been repealed or modified; but its whole contention was upon the theory that the contract never came under the protection of the act of 1877. It subsequently appealed the case to the circuit court of appeals. It made the same contention there and none other. It did not mention the act of 1897, much less base any claim upon it, or claim any rights under it. We venture the assertion that both the lower court and the circuit court of appeals were entirely ignorant of the fact that there was such a law as that of 1897 in existence. Counsel for defendant in error surely was. Defendant in error, we take it, will not claim it was. What excuse it may have or urge for not making the point we cannot imagine. That the plaintiff in error never raised this point is apparent from the decision of the circuit court of appeals. The principal opinion was written in the case of Hill *vs.* Ins. Co., 97 Fed., 263, and it shows conclusively no such question was raised. We will file a certified copy of the brief of plaintiff in error filed by it in that court, which fully supports our claim.

Points of Difference between this Case and the Sears and Hill Cases.

1. THERE IS NO CLAIM THAT MRS. COHEN IS ESTOPPED FROM ASSERTING HER CLAIM UNDER THIS POLICY.

2. THE ONLY DEFENSE IS THAT THIS POLICY BECAME FORFEITED BY ITS TERMS.

3. MRS. COHEN IS THE BENEFICIARY, AND DECLARATIONS OR AGREEMENTS MADE BY MR. COHEN COULD NOT BIND HER AS CLAIMED.

ARGUMENT.

I.

NEW YORK WAS THE PLACE OF CONTRACT, AND THE STATUTE OF 1877 WAS A PART OF THE CONTRACT.

In this case, as in the Sears, the contract was to be wholly performed in New York. The stipulation in the application contained the following agreement: That the application was made "subject to the charter of the company and the laws of New York" (Record, p. 22).

Our brief in the Sears case (pages 4–13, inclusive) fully covers the argument on this point, if any be needed, in view of the admission made by plaintiff in error on pages 72 to —, inclusive, in its Cohen brief, as follows:

"Cohen defaulted June, 1893, 1894, 1895, 1896. No notice having been sent the policy was not forfeited. This was the condition of things on June 10, 1896, and would have continued unless the legislature had intervened. During 1896 Cohen could at any time have paid up his premiums with interest, and restored his policy. *He had no*

other rights. By the terms of his contract it was forfeited, but the statute as to notice held this forfeiture as it were in suspense. It did not relieve him from the obligation to pay his premiums. It simply prevented the contracted effect of non-payment from taking place. There was no vested right in this effect. Cohen could say I paid no premium, but you have sent no notice, therefore my contract cannot be forfeited for that non-payment. We must admit that but for the act of 1897 the Cohen policy could not be forfeited for non-payment of the premium of June, 1896, until the statute of limitations had run, and it is not now important to determine whether that statute was the legal or equitable statute."

Plaintiff in error's brief, Cohen case, p. 72.

II.

THE STATUTE OF 1877 WAS A LIMITATION ON THE POWER OF THE CORPORATION TO FORFEIT CONTRACTS OF INSURANCE, EXCEPT IN CONFORMITY TO THE METHOD PROVIDED BY THE ACT.

This point is fully covered on pages 13–30, inclusive, Sears' brief.

III.

THE STATUTE COULD NOT BE WAIVED BY AN EXPRESS PROVISION OF THE POLICY TO THAT EFFECT.

This point is also fully covered in the Sears brief, pages 31–40, inclusive.

IV.

IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE PAYMENT OF THE PREMIUMS. IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE STATUTE OF NEW YORK; NEITHER WAS THERE A DEPARTURE FROM LAW TO LAW.

This point is fully covered by the argument in the Sears brief, pages 111–121, inclusive.

V.

THE PLAINTIFF IN ERROR DID NOT AND DOES NOT CLAIM TO HAVE PLEAD AN ESTOPPEL IN THIS CASE. THIS DEFENSE, WHICH IT CLAIMS TO HAVE MADE IN BOTH THE SEARS AND HILL CASES, IS ENTIRELY WANTING. SUCH A DEFENSE, IF ATTEMPTED TO HAVE BEEN MADE, WOULD NOT BE GOOD AGAINST MRS. COHEN, THE BENEFICIARY.

VI.

THE QUESTION OF THE APPLICABILITY OR EFFECT OF THE STATUTE OF 1897 SHOULD NOT BE CONSIDERED BY THIS COURT.

This case was submitted to the circuit court on the applicability of the statute of New York of 1877 only. The defendant in error claimed at the trial in the circuit court that the statute of New York of 1877 applied to the contract and governed the liability of the parties. The plaintiff in error contested this claim on the following grounds only:

That the statute of 1877 had no application for the reason that the contract was a Washington contract, and forfeited for non-payment of premiums; that the statute of New York of 1877 did not require the notices mentioned in the act to be served on non-resident policy-holders; that the notice required by the act of 1877 was by an express provision of the policy waived; that no tender of premiums had been made prior to commencement of action; that the cause of action was not properly pleaded, and that there was a departure.

These questions and these only were presented to the circuit court of appeals as grounds for reversal. The opinion of the circuit court of appeals, found in the record, fully

sustains this claim. The answer of plaintiff in error (see record) is based on the above points and those only. We will file with this brief a certified copy of the brief of plaintiff in error which it filed in the circuit court of appeals, which shows conclusively that the above points were the only ones raised and presented to the circuit court of appeals. The plaintiff in error submitted its case to the circuit court of appeals for reversal on those points and upon none others. It was never suggested by it at any time prior to the filing of its writ of certiorari here that there was in existence any such statute as that of 1897, much less was any claim made or based upon the statute of 1897. Having submitted its case thus made to a court whose decision is final, except in case of great gravity, etc., it is too late for plaintiff in error to raise the point in this court. It is a rule of practice, which we think is universal, that a party cannot raise a question in an appellate court that he did not raise and bring to the attention of the trial court, except it be one of jurisdiction. In such cases the party has as a matter of right an appeal to the appellate court. With how much greater force should the rule apply in a case where he has no such privilege of appeal as a matter of right, but where the right of appeal lies solely in the discretion of the higher court?

For full discussion of this point see Sears' brief, pages 124-130.

VII.

THE ACTION IS NOT BARRED BY THE LIMITATION CREATED BY ACT OF 1897.

The bar was not pleaded. (See Sears' brief, pages 130–136, inclusive.)

VIII.

THE ENACTMENT OF THE ACT OF 1897 DID NOT DISPENSE WITH THE STATUTORY NOTICE THERETOFORE PRESCRIBED.

This point is fully discussed in Sears' brief, pages 136–142, inclusive.

IX.

THE ACT OF 1897, IF SO INTENDED, WOULD CONSTITUTE AN IMPAIRMENT OF THE CONTRACT AND DISTURB VESTED RIGHTS.

This point is also fully covered in the Sears brief, pages 130–141, inclusive, to which brief we ask the court's attention. We will only add the following:

The policy was written on Mr. Hill's life for the benefit of his wife, who is and ever after the issuance of the policy was the real party in interest. The policy is termed a semi-endowment policy. On this policy Mrs. Cohen paid 7½ annual premiums. These premiums were very large, on account of the endowment feature of the contract, and as a consequence the reserve thereon was proportionately large. It is claimed that the policy became forfeited on the 10th day of December, 1892. At that time he was entitled under the act of 1879, chapter 347, Laws of 1879, to a paid-up policy of over $1,000, or extended insurance of over 13 years or about 9 years beyond his death (See Flitcraft's Manual on Insurance, '95 ed.), the company still forfeiting, as it might do under said act of 1879, one-third of said reserve; but under the said law of 1879 it was necessary for the beneficiary to surrender the policy within six months after forfeiture to get the benefit of either her extended or paid-up insurance; but it was not necessary for her to make her election until after she was placed in default. This was

expressly held by the highest court of New York in the case of Stokes *vs.* Ammerman, 121 N. Y., 337, on p. 323:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they become due will work this result. The statute, unless waived in writing (it should have same in writing, in red ink, on the face of the policy; see chapter 347, Laws of New York, 1879) on the face of the policy, provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy (chapter 347, Laws 1879). *And no policy can be declared or treated as lapsed or forfeited until 30 days after notice to the policy-holder.*"

Mrs. Cohen did not need to make her election under the laws of 1877 and 1879, which were in force when her contract was made, until she was served with the statutory notice, which, it is admitted, never was served when the case was tried in the circuit court. The plaintiff in error claimed the benefit of the act of 1877. Without its saving provision, the act of 1879 was of no benefit, because if default had occurred in December, 1892, more than six months had elapsed after such default, and there had been no surrender of the old policy for the new one, either for extended or paid-up insurance. The right to this notice, before being compelled to exercise her election in such a case, is surely a valuable vested right, especially when the penalty involved is taken into consideration. The act of 1897 does not pretend to take away any such valuable right, or produce any such harmful results. It is certainly within reason and a presumption in law that it was an inducement to Mrs. Cohen to

make this contract with this company and bring it under the New York laws, so he could have the benefit of their protection. We have discussed this feature of the case fully in the Sears brief, to which we ask the court's attention for further consideration.

See Sears' brief, pp. 136–141.

POINT X.

A point is made by plaintiff in error on the statute of 1897, to which there are two answers. One of them is omitted inadvertently from the Sears brief. It is here submitted for both the Cohen and Sears cases.

The argument is (1) that the statute of 1897 applies; (2) the policy became forfeit on the due date in 1897, whenever the due date was later than April 8 (date of act of 1897), because of non-payment of the 1896 premium. In other words (take the Sears policy), the policy became forfeit May 18, 1897, because the May, 1896, premium was not paid within the year following the due day thereof.

The answers are (1) (made in Sears' brief) the act of 1897 does not apply to non-resident policy-holders; (2) on April 8, 1897, Sears had a subsisting policy, subject to forfeiture for non-payment of past premiums if the company should give him 30 days' notice and he not pay within the 30 days. If the company had on April 8, 1897, given the notice, the policy would have been valid until May 8. The company asks the court to impute to the legislature the intent to forfeit it 10 days later *without notice*, though, in order to do so, the court must give a retroactive effect to a statute the language of which does not require it.

XI.

THE STATUTORY PROVISIONS REQUIRING NOTICE WHICH WERE IN EFFECT AT THE TIME OF THE ENACTMENT OF THE ACT OF 1897 WERE NOT REPEALED THEREBY AS TO EXISTING POLICIES.

Sears' brief, p. 142

a.

THE ACT OF 1892 DID NOT REPEAL THE ACT OF 1877 AS TO EXISTING POLICIES.

Sears' brief, pp. 141, 142.

b.

THE ACT OF 1897 DID NOT REPEAL THE ACT OF 1877 NOR SECTION 291 OF THE ACT OF 1892.

Sears' brief, pp. 143–145.

d.

THE ACT OF 1897 DID NOT REPEAL SECTION 92 OF THE ACT OF 1892 AS TO EXISTING POLICIES.

Sears' brief, pp. 145–150.

e.

IN ORDER THAT AN ACT BE UPHELD AS A VALIDATING ACT, IT IS ESSENTIAL THAT THE INTENT BE CLEARLY EXPRESSED.

Sears' brief, pp. 150, 151.

We respectfully submit that the judgment of the circuit court of appeals, as well as the judgment of the circuit court, should in all things be affirmed.

S. WARBURTON,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 452, 453, 454.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

COHEN.

SAME *vs.* HILL.

SAME *vs.* SEARS, EXECUTRIX, &C.

Supplemental Brief of Defendant in Error, Filed by Leave of Court.

I.

THE DEFENSE OF ESTOPPEL, WAIVER, OR ABANDONMENT CANNOT PREVAIL AGAINST THE BENEFICIARIES.

There is no such defense pleaded in the Cohen case.

It is not claimed that Mrs. Hill and the Hill children, beneficiaries, made any statement or did anything that estops the children from maintaining the suit. In the Hill

case the children, ever since the death of their mother, have been and are the real parties in interest. Prior to the death of Mrs. Hill she, and at all times the children, had the right to pay the premiums at any time before default. Ever since the issuance of the policy it has been their contract and not Mr. Hill's. We have shown in our principal brief that under the decisions of the highest court of New York the premiums were not due until thirty days after the service of the statutory notice. There is no claim made that Mrs. Hill and the children did not have the right to pay the premiums; nor did any of them at any time state that they could not or would not pay them. Then, so far as they are concerned, the policy was never forfeited, nor were they ever placed in default. If the alleged agreement of Mr. Hill and the insurance company is good, or if his statement amounts to an estoppel, then the contract was ended at once at the time the alleged agreement or the estoppel took place, and the beneficiaries had no opportunity to pay thereafter, whereas the statute gave them at all times a minimum of 30 days in which to pay. Suppose Mrs. Hill had assigned the contract to secure a debt (leaving out for the purpose of the suggestion the minor heirs of Mrs. Hill), then under the statute the notice must have been served on the assignee. Mrs. Hill was the only party who could assign the policy. It is needless to say in such a case that any declaration or statement that Mr. Hill might make thereafter could not bind Mrs. Hill or the assignee, because each would have the right to pay the premium before default; nor could any declaration of the assignee as to the payment of the premium or the waiver of notice bind Mrs. Hill, though he would be the party upon whom such notice must be served. Mrs. Hill would still have the right to pay the premium; yet her right to pay the premium after assignment was no greater than her right to pay the premium before the assignment, and the declaration of the assignee would no

more bind Mrs. Hill after the assignment than the declaration of Mr. Hill before the assignment. Our contention along this line is fully supported by all of the authorities. The case of Pingrey against the National Life Insurance Company, decided by the supreme court of Massachusetts, 144 Mass., 381, fully supports our contention. In that case the court said:

"There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. 'An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

To the same effect is Bacon on Insurance, vol. 1, section 292, which cites the above case with approval. The supreme court of Mississippi, in the case of Granger Insurance Company against Brown, 57 Miss., 308, 315, sustains the rule in this language:

"The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered the agent of the beneficiary in procuring it, his agency

ceases with its issuance, so that there is no legal ground upon which his statements can be received."

Mr. Justice Brewer, in the opinion delivered by him in the supreme court of Kansas, Washington Insurance Company *vs.* Haney, 10 Kansas, 395, 403, uses this language:

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest insured to the assured. She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him."

This point has also been decided by the court of appeals of New York. In that case the policy by its terms became lapsed, and subsequently thereto the husband took out another policy, payable to a different beneficiary. The company defended on the ground that the original beneficiary had no standing in the court, because the original policy had become lapsed by its terms and her rights thereunder were thus ended; but the court says:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they become due will work this result. The statute, unless waived in writing (the court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1879) on the face of the policy, provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy (chapter 347, Laws

1879). *And no policy can be declared or treated as lapsed or forfeited until* 30 *days after notice to the policy-holder.*"

Stokes *vs.* Ammerman, 121 N. Y., 337, on p. 323.

A case also from the court of appeals of New York stated this proposition in the following language:

"His was the life insured, but the contract was not with him except as trustee for his children, and as representing them. He took upon himself this office and duty with the full knowledge and assent of the company on the one hand, and the beneficiaries on the other. Every premium paid by him continued to be an act as trustee and agent for the children, and he could not shake off that character and duties without their consent, except in one way. He might omit or refuse to pay a maturing premium, and so suffer the policy to lapse; but the children were at liberty to pay it, though he should refuse, and if they did, the contract would remain valid as at first, and suffer no injury or destruction from his refusal to pay, or to further act as his children's trustee. These children thus had a vested interest in the policy, increasing in value yearly with every payment of additional premium. That interest was measured and represented by its surrender value, which was never the property of John Lindemann in any other sense than as the trust property of the children created by his act as trustee. He could not deal with it in contravention of their rights, especially with one fully apprised of those rights, and of his position and duty as trustee." * * *

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo without their consent, nor take from them

what was already theirs and destroy the trust so far as executed."

Garner *vs.* Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

The following cases fully support us in our claim (Cohen brief, page 6):

Frank *vs.* Hume, 128 U. S., 206, 207.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Whitehead *vs.* Ins. Co., 123 N. Y., 156.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pilcher *vs.* Ins Co., 33 La., 322.
Pingrey *vs.* National Ins. Co., 144 Mass., 374.
Bayse *vs.* Adams, 81 Ky., 368.
Weisert *vs.* Miehl, *id.*, 336.
Wilmaser *vs.* Continental Life Ins. Co., 86 Iowa, 417.
Allis *vs.* Ware, 28 Minn., 166.
City Savings Bank *vs.* Whittle, 63 N. H., 587.
Hooker *vs.* Sugg, 102 N. C., 115, 120.
Conn. Mut. *vs.* Baldwin, 15 R. I., 106.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Kline *vs.* National Ben. Ass'n, 111 Ind., 462.
Splawn *vs.* Chew, 60 Tex., 532.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Waldron *vs.* Waldron, 76 Ala., 285.
Supreme Lodge *vs.* Schmidt, 98 Ind., 374.
(For fuller discussion of case last cited see Hill brief.)

The law seems to be well settled that the insured cannot, to the prejudice of a beneficiary, surrender (even for value received) a live policy. It is claimed that Hill and Cohen surrendered the policies, but with the claim is coupled the

admission that at the time of the alleged surrender no statutory notice had been mailed. It follows, under the express provisions of the statute and the uniform current of decisions, notably the New York cases, that at the time of the alleged surrender the Hill and Cohen policies were live policies, and no premium was *in default*. Therefore the alleged surrender was ineffectual as to the beneficiaries.

The law seems to be also well settled that the beneficiaries were entitled to pay any premium. The statute gave them thirty days after mailing of notice within which to exercise this right. At the time of the alleged surrender (whenever it may have been) the beneficiaries had thirty days after a notice shou'd thereafter be mailed in which to pay. (As the notice was never mailed, the thirty-day period never commenced to run, whereas if the notice had been mailed immediately upon the alleged surrender, they would have had only thirty days.) It would seem logically to follow that the surrender did not cut off this right of the beneficiaries, nor cut short the time for its exercise, and therefore the policies remained subsisting thereafter and up to the time of the death.

We deny that the answers allege a surrender, and submit that the most that can rightfully be made out of the allegations is an *intention to abandon or surrender*, accompanied by what plaintiff in error claims to be facts of inducement, reliance, and injury, but which, we assert, omits at least two (in the Sears case, three) of these necessary elements of an estoppel. An abandonment or surrender must have the two ingredients, viz., intention to abandon or surrender and the act of abandonment or surrender. In the one case discussed the two—intention and act—are supposed to have been coincident. In the other, the intention is supposed to have existed and been declared at one time, the act never to have taken place, but the insured and beneficiary to be estopped to deny it. Certainly, if an actual surrender

would have been ineffectual against the beneficiaries, the alleged estoppel is.

II.

ESTOPPEL.

Under the act of 1877 the statutory notice might precede or follow the due date. The waiver in the policy is of both or either. These notices can (for brevity) be termed, respectively, *advance* and *subsequent*.

a.

The waiver in the policy is ineffectual as to any future notice *of either kind*.

The Clements case, opinions by Brewer, J., and by this court, cited in main brief, page 37, where see other cases on the point.

b.

After the payment of a premium and before the next due date, a statement of the insured, oral or written, waiving all future notices of either kind would be likewise ineffectual.

c.

Under like circumstances a like waiver of some particular future notice of either kind would be likewise ineffectual.

d.

Under like circumstances a like waiver of the next *advance* notice would therefore be ineffectual.

e.

Under like circumstances a like waiver of the next *subsequent* notice would be ineffectual.

9

f.

After the first premium on the Sears policy was passed, the policy was, nevertheless, under the New York statute, a live, subsisting policy, and the insured was not in default. Under such circumstances, would his waiver, oral and written, of the next advance notice be effectual? It is respectfully submitted that the proposition under this head is not different from that under *d*, above. In each case the policy was a subsisting contract and the insured not in default.

g.

Under the state of facts supposed in *f*, the company might give a subsequent notice on account of the passing of the first premium. The non-compliance with the notice would have given the company the right by statute to declare the policy forfeited or lapsed. Could the company use the waiver to accomplish the same result? We say no, and give our reasons in the way of an illustration. Let us suppose that Sears passed the first premium (due date thereof, May 16, 1893), the company not having given the advance notice relative thereto. The company might then have given the subsequent notice. Instead of doing so the company opened correspondence with him, or sent an agent to interview him, with the purpose of persuading him to pay the premium. In answer, he refused to pay; stated that he did not intend to pay that premium; that he did not intend to pay any premium; that he intended to abandon the policy, and "elected to have it terminated." Notwithstanding these statements, the company failed to give the subsequent notice. Let us suppose, further, that Sears died during the year; his executrix sued upon the policy; the company defended on the facts aforesaid, claiming thereby that the policy was lapsed. This would be an attempt on the part of the company to have the policy adjudged to have

lapsed by virtue of the estoppel, claiming to have withheld the notice because of the statement of the insured aforesaid. It is just such attempts that the statute forbids. The statute reads:

"No policy shall be forfeited or declared forfeited *or lapsed* until the expiration of thirty days after the mailing of such notice."

The effect of the plea is that the policy is lapsed, not by the exclusive method provided by the statute, but by a substitute method. In considering this proposition it should be borne in mind that at the time this supposed statement was made (whenever that time was) the policy was a subsisting contract, and the insured had at least thirty days in which to pay, on any one of which days he had a perfect legal and moral right to change his mind and pay, and such change of mind could not have prejudiced the legal rights of the company. It should also be borne in mind that this period was not limited in the supposed case to thirty days, but extended for thirty days after the said subsequent notice or any future advance or subsequent notice should be given. So we think it is clear that if the passed premium had been the first (due date thereof, May 16, 1893) and Sears had died during the year, the defense would be held insufficient. The same result would seem to follow logically if we supposed a case wherein two premiums are passed, or even three, four, or five.

On the argument it was suggested from the bench that perhaps the fact that as many as five premiums were passed would be sufficient showing of the actual abandonment of the policy. We argued then, as we do now, that the facts alleged in the answer in the Sears case did not go so far as to plead the actual accomplishment of the abandonment, but only the declaration of the intention to abandon, followed by a failure to pay for the length of time, as to the length of which time the court must remain in igno-

rance, owing to the indefiniteness of the answer in that respect. If we supposed the length of time to have been the longest possible period, to wit, between four and five years, nevertheless we respectfully submit that the length of this period of inaction cannot rightfully be said to make a sufficient showing to constitute the act of abandonment, but rather to make more certain the intention to abandon. Abandonment, as before stated, must combine the act with the intention. There is no allegation that the policy was surrendered up or canceled. Add to these considerations the fact that it is nowhere alleged that the statements were designed to induce the company to withhold any notice; that there is no allegation that the company was induced by them to withhold any notice: that there is no allegation that the company altered its condition or changed its course of conduct in reliance upon the statement, and the further vital fact that it does not appear from the answer but that the statements may have been made at a time when, if the company had not acted upon them, but had at the earliest possible moment given a notice, the notice itself would have kept the policy alive for the period extending beyond the day of the death of Sears—taking all these things into consideration, the conclusion seems irresistible that the facts do not constitute a defense to the action upon the policy. In this connection the court is asked to notice its opinion in the Mowry case, 96 U. S., 547 (main Brief, p. 71).

The court there said that a declaration of an intended abandonment of an existing right would have the effect of an estoppel "if the party, who by his statements as to his intended abandonment of existing rights, *designedly* induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements or enforce his right against his declared intention of abandonment."

III.

THE ACT OF 1897.

a.

On the question of power of the legislature by a subsequent act to withdraw the previous statutory requirement of notice, we wish to recall the court's attention to the Carter case (110 N. Y.) in its relation to the Rosenplanter case. The circuit court of appeals bases its decision in the Rosenplanter case largely upon the decision of the New York court of appeals in the Carter case, assuming that the New York court had held thereby that such legislation was competent. The constitutional question did not arise in the Carter case, and could not do so, owing to the facts in the case as they appear from the opinion. Carter lived in Georgia and up to the time of the passage of the first anti-forfeiture act had uniformly paid his premiums in Georgia. Upon the passage of the act the company sent him a copy of the act, with the statement indorsed thereon that thereafter the company would send the notice referred to in the statute, and that thereafter the insured must pay his premiums in New York. Here was an adoption by the company, as applicable to the policy, of the New York statute. Acting on the suggestion made in this communication, Carter for a number of years thereafter remitted his premiums to New York, thereby accepting on his part the company's offer to bring the policy under the act.

b.

The entire argument of counsel for plaintiff in error in their supplemental brief upon the question relating to the act of 1897 is based upon the assumption that the legislature by the act of 1897 intended to do away with statutory

notice, past and future, as to all existing policies held by persons having no post-office address in the State of New York, and this assumption involves the further one that the act of 1897 absolutely repeals all provisions as to statutory notice to holders of existing policies having no post-office address in the State of New York.

That the legislature should not be said to have so intended is, we think, very clearly pointed out in our main brief. (In this connection attention of the court is called to the fact that some additional discussion of the act of 1897 is contained in our Cohen brief.) It should be remembered that it is an admitted fact that Sears lived and died in the State of Washington, and it was admitted in the oral argument that Sears had at no time a post-office address in the State of New York, and we claim, with all deference to counsel, that it is most illogical for them to argue that the year limitation periods created by the act of 1897 applied to the Sears policy, and at the same time that the act of 1897 repealed, as to the Sears policy, all previous statutory provisions as to notice.

IV.

In the discussion contained in the supplemental brief of the plaintiff in error under *Point IV*, wherein it is asserted that all questions arising under the act of 1897 are open to discussion and determination in this court, the *right* of this court to consider those questions is alone discussed. In our principal brief and now we argue:

First. That, as a matter of right, the court should not consider them; and,

Second. That if it be otherwise, nevertheless the court, having taken this case by virtue of a discretionary power, should not exercise its discretion for the purpose adjudicat-

ing a point in the case which was not submitted to the circuit court of appeals.

V.

The questions presented in this case were so many, so varied, and so interesting that is was impossible for them to be satisfactorily covered in the oral argument. The brief of the defendant in error is especially full and complete on the question of estoppel, subsequent waiver, and abandonment. We invite attention of the court to the discussion therein of those questions particularly.

Respectfully submitted.

STANTON WARBURTON,
Attorney for the Several Defendants in Error.

HAROLD PRESTON,
Of Counsel in the Sears Case.

Supreme Court of the United States.

No. 157.—October Term, 1900.

The Mutual Life Insurance Company of New York, Petitioner, *vs.* Tine Cohen. } On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 3, 1900.]

On June 10, 1885, the petitioner delivered to Alexander Cohen, in the State of Montana, a life insurance policy for $3,000, conditioned upon the annual payment of a premium of $89.61. Upon it the insured paid premiums up to and including June 10, 1892. No subsequent premiums were paid. On September 21, 1897, he died. His wife, Tine Cohen, was the beneficiary named in the policy.

The application commenced in these words: "Application for insurance in the Mutual Life Insurance Company of New York, 140 to 146 Broadway, corner of Liberty street, New York City, subject to the charter of such company and the laws of said State." It further contained this provision: "That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy." Among those conditions and stipulations was this: "Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

On November 9, 1898, this action was commenced in the Circuit Court of the United States for the District of Washington.

The single defense was the non-payment of premiums after June 11, 1892. There was no suggestion of rescission, abandonment, knowledge by the beneficiary of the non-payment of the premium, or any refusal or failure on her part in respect to the policy. A demurrer to the answer was sustained, judgment rendered for the amount of the policy, less the unpaid premiums, which judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, (38 C. C. A. 696,) and thereupon the case was brought here on certiorari.

Mr. Justice Brewer delivered the opinion of the Court.

Mutual Life Insurance Company v. *Phinney*, (178 U. S. 327,) was an action against the same insurance company, in the same district, on a policy like the one in controversy here, save that in that the insured was himself

the beneficiary. It resulted in a judgment in the Circuit Court against the company. Thereupon the company sought to transfer it by writ of error to the Court of Appeals of that circuit, but that court dismissed the writ of error. Thereafter, on April 19, 1897, a certiorari was issued by this court. (166 U. S. 721.) On examination we held that the Court of Appeals erred in dismissing the writ of error, that it had jurisdiction, and that it ought to have reversed the judgment of the Circuit Court. The decision was based on the ground of error in the ruling of the Circuit Court in respect to rescission and abandonment. In the opinion we referred to the fact that there was a primary question of the applicability of a statute of the State of New York, but deemed it unnecessary to decide it. That decision was followed by the cases of the same Company against Sears, 178 U. S. 345; against Hill, Id. 347; against Allen, Id. 351. All of which cases were disposed of in like manner.

The primary question noticed but not decided in those cases is distinctly and solely presented in this.

The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that State. (*Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, 232.) In that State, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

New York, on the other hand, the State by which the insurance company was chartered and in which it had its principal office, by section 1 of chapter 321 of 1877 had enacted—

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided."

The provision referred to and which is stated at length in the succeeding part of the section is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330.

This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover,

The question, therefore, is whether the law of New York controls.

The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the State. Proceeding on the accepted principle that a State may determine

the conditions, the meaning and limitations of contracts executed within its borders the language of the statute reaches contracts made within the State. Undoubtedly a foreign insurance company making a contract within the State of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the State, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the State? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other States to control insurance contracts made within their limits. Can it be that the State of New York, aware of the fact that other States and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those States and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home?

Again, it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice. See Laws 1876, chap. 341, sec. 1; the statute now under consideration, Laws 1877; Laws 1892, chap. 690, sec. 92; Laws 1897, chap. 218, sec. 92. The varying provisions of these statutes, directed in terms, not to local companies but to companies doing business in the State of New York, strengthen the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State.

Again, the terms of the act itself tend in the same direction. It provides for a 30-day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a 30-day notice in many cases would be of little value.

Further, by section 2 the statute provides that an affidavit by one authorized to mail the notice shall be "presumptive evidence" of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be enforced in every State and nation of the world?

These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the State, was intended to be, and is, in fact, applicable only to business transacted within that State.

It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is "subject to the charter of such company and the laws of said State;" and the contract refers to the application, and declares that it is issued "in consideration of the application for this policy and of the truth of the several statements made therein." While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York.

Further, it may be noticed that even if the language justifies a broader construction, it may well mean that only such laws of the State of New York as are intended to and do change the charters of the companies or are intended to have extraterritorial application should be considered a part of the policy.

The stipulation in this policy is different from that presented to the Court of Appeals of New York in *Baxter* v. *Brooklyn Life Ins. Company*, (119 N. Y. 450, 454,) which was that it was "a contract made and to be executed in the State of New York, and construed only according to the laws of that State." There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms.

While authorities on this particular question are not numerous, we may properly refer to an opinion of the Supreme Court of Washington, the State in which this action was brought, *Griesemer* v. *Mutual Life Insurance Company*, (10 Wash. 202,) in which, referring to this special question, and the contention that this very statute of the State of New York became a part of the contract of the company in the State of Washington, the court said, on pages 206, 207:

"It is claimed on the part of the plaintiff that upon its enactment it became attached to the defendant, it being a corporation organized under the laws of New York, and effected a change in its charter; so that every policy thereafter issued by it, whether in the State of New York or elsewhere, became subject to its provisions. On the other hand, it is claimed by the defendant that it only affected policies issued to, or held by, residents of the State of New York; that the evident object of its enactment was to protect such residents; that to give it a broader effect would be to convict the legislature of having discriminated against life insurance companies organized under the laws of the State.

"We are unable to construe the law in accordance with the contention of either party. The construction contended for by the defendant is too narrow. The language used is, that 'No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy. . . .' This language, construed in its ordinary sense, seems to preclude such a narrow construction. Beside, if it were warranted by the language, it would not be reasonable to suppose that the legislature intended to so limit the effect of the statute. If it had so intended, it would have made use of language which in some manner confined the rights to be affected by the statute to residents of the State, instead of to companies doing business therein. While the construction, contended for by the plaintiff, seems to be equally untenable, for the reason that it would convict the legislature of having sought to accomplish something not in its power. So construed the act would apply to all policies of any company which should do business in the State of New York, wherever issued, regardless of the question as to whether or not it was organized under its laws. That the legislature of New York could not control companies not organized under its laws as to their business transacted in other States is too clear for argument. Hence the construction contended for by respondent would convict the legislature of having attempted that which it could not do, or of having deliberately discriminated against its own companies.

"In our opinion the reasonable and ordinary construction of the language used in the statute is such as to make it applicable to business done in the State of New York; and that the question as to whether or not the companies doing such business were organized under its laws, or those of some other State, has no influence upon the question as to whether or not the statute is applicable. This construction is justified by the language used, and will give force to every word, while the other will not do so. And since the well-settled rule as to construction of statutes requires every word to be given force if possible, it follows that the limitations of the act are impressed upon all policies issued in the State of New York by either domestic or foreign companies, and that it has no application to policies not issued therein, even although the companies issuing them were organized under its laws."

The New York cases cited by counsel throw no light on the question. *Baxter* v. *Brooklyn Life Ins. Co.*, (119 N. Y. 450,) contained in the contract, as heretofore stated, an express stipulation of the controlling law. In *Carter* v. *Brooklyn Life Ins. Co.*, (110 N. Y. 15,) the question was as to the significance of the word "renewed" in the section referred to, and it does not appear where the policy was issued. In *Phelan* v. *Northwestern Mutual Life Ins. Co.*, (113 N. Y. 147,) the statute was held applicable to a foreign insurance company doing businsss in the State of New York, the notice given was held insufficient, and no question was considered as to the scope of the statute otherwise. *De Frece* v. *National Life Ins. Co.*, (136 N. Y. 144,) was likewise an action against a foreign insurance company, and involved no question like that before us. *Rae's Executors* v. *National Life Ins. Co.*, (20 U. S. App. 410,) was also an action against a foreign insurance company, and the question was simply as to the sufficiency of the notice.

We conclude, therefore, that the statute of the State of New York does not under the circumstances presented control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited. The judgment of the Circuit Court of Appeals will be reversed and the case remanded to the Circuit Court of the United States for the District of Washington, with instructions to set aside the judgment and overrule the demurrer.

Mr. Justice McKenna dissents.

Mr. Justice Peckham takes no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.